

REFINITIV

DELTA REPORT

10-Q

NKLA - NIKOLA CORP

10-Q - SEPTEMBER 30, 2023 COMPARED TO 10-Q - JUNE 30, 2023

The following comparison report has been automatically generated

TOTAL DELTAS 5248

■ CHANGES	324
■ DELETIONS	3604
■ ADDITIONS	1320

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended **June 30, 2023** **September 30, 2023**

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to

Commission File Number: 001-38495

Nikola Corporation

(Exact Name of Registrant as Specified in Its Charter)

Delaware

(State or other jurisdiction of incorporation or
organization)

82-4151153

(I.R.S. Employer
Identification No.)

4141 E Broadway Road

Phoenix, AZ

85040

(Address of principal executive offices)

(Zip Code)

(480) 666-1038

(Registrant's telephone number, including area code)

N/A

(Former name, former address and former fiscal year, if changed since last report)

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Trading Symbol(s)	Name of each exchange on which registered
Common stock, \$0.0001 par value per share	NKLA	The Nasdaq Stock Market LLC

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act:

Large accelerated filer	<input type="checkbox"/>	Accelerated filer	<input type="checkbox"/>
Non-accelerated filer	<input type="checkbox"/>	Smaller reporting company	<input type="checkbox"/>
		Emerging growth company	<input type="checkbox"/>

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes No

As of August 1, 2023 October 30, 2023, there were 779,457,337 1,016,409,878 shares of the registrant's common stock outstanding.

NIKOLA CORPORATION CONSOLIDATED FINANCIAL STATEMENTS

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Summary of Risk Factors

Our business is subject to numerous risks and uncertainties that could affect our ability to successfully implement our business strategy and affect our financial results. You should carefully consider all of the information in this report and, in particular, the following principal risks and all of the other specific factors described in Item 1A. of this report, "Risk Factors," before deciding whether to invest in our company.

- We are an early stage company with a history of losses, expect to incur significant expenses and continuing losses for the foreseeable future, and there is substantial doubt that we will have sufficient funds to satisfy our obligations through the next 12 months from the date of this report.
- We may be unable to adequately control the costs associated with our operations.

- We need to raise additional capital, which may not be available to us when we need it. If we cannot raise additional capital when needed, our operations and prospects will be negatively affected.
- Our business model has yet to be tested and any failure to commercialize our strategic plans would have an adverse effect on our operating results and business, harm our reputation and could result in substantial liabilities that exceed our resources.
- Our limited operating history makes evaluating our business and future prospects difficult and may increase the risk of your investment.
- We need to raise additional capital, which may not be available to us when we need it. If we cannot raise additional capital when needed, our operations and prospects will be negatively affected.
- Our future success is dependent upon the trucking industry's willingness to adopt hydrogen-electric ("FCEV") trucks and battery-electric ("BEV") trucks and timing of the adoption.
- If we fail to manage our future growth effectively, we may not be able to market and sell our vehicles successfully.
- We may offer a future bundled lease model that could present unique problems and may have an adverse effect on our operating results and business and harm our reputation.
- We may face legal challenges in one or more states attempting to sell directly to customers, which could materially and adversely affect our costs.
- We face risks and uncertainties related to litigation, regulatory actions and government investigations and inquiries.
- We Product recalls have and may face challenges related to perceptions of safety for commercial electric vehicles, especially if adverse events or accidents occur that are linked to in the quality or safety of commercial electric vehicles. future materially and adversely affect our business prospects, operating results and financial condition.
- Our success will depend on our ability to economically manufacture our trucks at scale and develop hydrogen fueling infrastructure to meet our customers' business needs, and our ability to develop and manufacture trucks of sufficient quality and appeal to customers on schedule and at scale is unproven.
- We may experience significant delays in the design, manufacture launch and financing of our trucks, which could harm our business and prospects.
- Increases in costs, disruption of supply or shortage of raw materials and delays in the manufacturing and servicing of battery-packs for our BEV and FCEV trucks could harm our business.
- Our plan to build a network of hydrogen fueling stations will require significant cash investments and management resources and may not meet our expectations with respect to additional sales of our FCEV trucks. In addition, we may not be able to open fueling stations in certain states.
- We may not be able to produce or source the hydrogen needed to establish our planned hydrogen fueling stations.
- Our inability stations, or may not be able to cost-effectively produce or source the energy requirements to conduct electrolysis hydrogen needed at our fueling stations may impact the profitability of our proposed bundle leases by making our hydrogen uneconomical compared to other vehicle fuel sources.
- Increases in costs, disruption of supply or shortage of raw materials, including lithium-ion battery cells, chipsets, and displays, and delays in the manufacturing and servicing of battery-packs for our BEV and FCEV trucks following the assignment of Romeo, could harm our business. competitive prices.
- Reservations for the purchase or lease for our trucks may be are cancellable.
- Collaboration with strategic partners is subject to risks.
- We are or may be subject to risks associated with strategic alliances or acquisitions.
- We may face challenges related to perceptions of safety for commercial electric vehicles, especially if adverse events or accidents occur that are linked to the quality or safety of commercial electric vehicles.
- We identified a material weakness in our internal control over financial reporting. If we are unable to remediate this material weakness, or if we experience additional material weaknesses or other deficiencies in the future or otherwise fail to maintain an effective system of internal control over financial reporting, we may not be able to accurately or timely report our financial results.
- Servicing our debt may require a significant amount of cash, and we may not have sufficient cash flow from our business to pay our substantial debt.

PART I - FINANCIAL INFORMATION

Item 1. Financial Statements

NIKOLA CORPORATION CONSOLIDATED BALANCE SHEETS

(In thousands, except share and per share data)

(Unaudited)

	June 30, 2023	December 31, 2022	September 30, 2023	December 31, 2022
(Unaudited)				

Assets	Assets			Assets
Current assets	Current assets			Current assets
Cash and cash equivalents	Cash and cash equivalents	\$ 226,673	\$ 225,850	Cash and cash equivalents
Restricted cash and cash equivalents	Restricted cash and cash equivalents	600	10,600	Restricted cash and cash equivalents
Accounts receivable, net	Accounts receivable, net	19,998	31,638	Accounts receivable, net
Inventory	Inventory	86,635	111,870	Inventory
Prepaid expenses and other current assets	Prepaid expenses and other current assets	73,010	27,943	Prepaid expenses and other current assets
Assets subject to assignment for the benefit of creditors, current portion	Assets subject to assignment for the benefit of creditors, current portion	—	29,025	Assets subject to assignment for the benefit of creditors, current portion
Total current assets	Total current assets	406,916	436,926	Total current assets
Restricted cash and cash equivalents	Restricted cash and cash equivalents	68,082	77,459	Restricted cash and cash equivalents
Long-term deposits	Long-term deposits	17,329	34,279	Long-term deposits
Property, plant and equipment, net	Property, plant and equipment, net	483,043	417,785	Property, plant and equipment, net
Intangible assets, net	Intangible assets, net	89,564	92,473	Intangible assets, net
Investment in affiliates	Investment in affiliates	58,289	62,816	Investment in affiliates
Goodwill	Goodwill	5,238	6,688	Goodwill
Other assets	Other assets	9,040	8,107	Other assets
Assets subject to assignment for the benefit of creditors	Assets subject to assignment for the benefit of creditors	—	100,125	Assets subject to assignment for the benefit of creditors
Total assets	Total assets	\$ 1,137,501	\$ 1,236,658	Total assets
Liabilities and stockholders' equity	Liabilities and stockholders' equity			Liabilities and stockholders' equity
Current liabilities	Current liabilities			Current liabilities
Accounts payable	Accounts payable	\$ 45,767	\$ 93,242	Accounts payable
Accrued expenses and other current liabilities	Accrued expenses and other current liabilities	173,957	179,571	Accrued expenses and other current liabilities
Debt and finance lease liabilities, current (including zero and \$50.0 million measured at fair value, respectively)		13,417	61,675	
Debt and finance lease liabilities, current (including \$32.4 million and \$50.0 million measured at fair value, respectively)				Debt and finance lease liabilities, current (including \$32.4 million and \$50.0 million measured at fair value, respectively)
Liabilities subject to assignment for the benefit of creditors, current portion	Liabilities subject to assignment for the benefit of creditors, current portion	—	49,102	Liabilities subject to assignment for the benefit of creditors, current portion
Total current liabilities	Total current liabilities	233,141	383,590	Total current liabilities
Long-term debt and finance lease liabilities, net of current portion	Long-term debt and finance lease liabilities, net of current portion	348,392	290,128	Long-term debt and finance lease liabilities, net of current portion
Operating lease liabilities	Operating lease liabilities	5,072	6,091	Operating lease liabilities
Other long-term liabilities	Other long-term liabilities	28,165	6,684	Other long-term liabilities
Deferred tax liabilities, net	Deferred tax liabilities, net	15	15	Deferred tax liabilities, net

Liabilities subject to assignment for the benefit of creditors	Liabilities subject to assignment for the benefit of creditors	23,671	Liabilities subject to assignment for the benefit of creditors	—	23,671
Total liabilities	Total liabilities	614,785	Total liabilities	544,718	710,179
Commitments and contingencies (Note 12)	Commitments and contingencies (Note 12)		Commitments and contingencies (Note 12)		
Stockholders' equity	Stockholders' equity		Stockholders' equity		
Preferred stock, \$0.0001 par value, 150,000,000 shares authorized, no shares issued and outstanding as of June 30, 2023 and December 31, 2022		—	Preferred stock, \$0.0001 par value, 150,000,000 shares authorized, no shares issued and outstanding as of September 30, 2023 and December 31, 2022	—	—
Common stock, \$0.0001 par value, 800,000,000 shares authorized, 769,300,317 and 512,935,485 shares issued and outstanding as of June 30, 2023 and December 31, 2022, respectively		77	Common stock, \$0.0001 par value, 1,600,000,000 and 800,000,000 shares authorized as of September 30, 2023 and December 31, 2022, respectively, 992,033,979 and 512,935,485 shares issued and outstanding as of September 30, 2023 and December 31, 2022, respectively	99	51
Preferred stock, \$0.0001 par value, 150,000,000 shares authorized, no shares issued and outstanding as of September 30, 2023 and December 31, 2022			Preferred stock, \$0.0001 par value, 150,000,000 shares authorized, no shares issued and outstanding as of September 30, 2023 and December 31, 2022	—	—
Common stock, \$0.0001 par value, 1,600,000,000 and 800,000,000 shares authorized as of September 30, 2023 and December 31, 2022, respectively, 992,033,979 and 512,935,485 shares issued and outstanding as of September 30, 2023 and December 31, 2022, respectively			Common stock, \$0.0001 par value, 1,600,000,000 and 800,000,000 shares authorized as of September 30, 2023 and December 31, 2022, respectively, 992,033,979 and 512,935,485 shares issued and outstanding as of September 30, 2023 and December 31, 2022, respectively	99	51
Additional paid-in capital	Additional paid-in capital	2,944,504	Additional paid-in capital	3,520,890	2,562,855
Accumulated deficit	Accumulated deficit	(2,421,772)	Accumulated deficit	(2,917,473)	(2,034,850)
Accumulated other comprehensive loss	Accumulated other comprehensive loss	(93)	Accumulated other comprehensive loss	52	(1,577)
Total stockholders' equity	Total stockholders' equity	522,716	Total stockholders' equity	603,568	526,479
Total liabilities and stockholders' equity	Total liabilities and stockholders' equity	\$ 1,137,501	Total liabilities and stockholders' equity	\$ 1,148,286	\$ 1,236,658

See accompanying notes to the consolidated financial statements.

NIKOLA CORPORATION
CONSOLIDATED STATEMENTS OF OPERATIONS
 (In thousands, except share and per share data)
 (Unaudited)

		Three Months Ended June 30,				Six Months Ended June 30,				Three Months Ended September 30,				Nine Months Ended September 30,									
		2023		2022		2023		2022		2023		2022		2023		2022							
		Revenues:		Revenues:		Revenues:		Revenues:		Revenues:		Revenues:		Revenues:		Revenues:							
Truck sales	Truck sales	\$ 12,006	\$ 17,383	\$ 22,061	\$ 17,383	Truck sales	\$ (2,368)	\$ 23,853	\$ 19,693	\$ 41,236	Service and other	636	388	4,614	3,026	Total revenues	(1,732)	24,241	24,307	44,262			
Service and other	Service and other	3,356	751	3,978	2,638	Total revenues	15,362	18,134	26,039	20,021	Cost of revenues:	40,203	46,781	73,223	46,781	Cost of revenues:	122,679	54,080	195,902	100,861			
Total revenues	Total revenues	15,362	18,134	26,039	20,021	Service and other	2,790	610	3,144	2,066	Cost of revenues:	2,790	610	3,144	2,066	Cost of revenues:	1,092	330	4,236	2,396			
Total cost of revenues	Total cost of revenues	42,993	47,391	76,367	48,847	Total cost of revenues	42,993	47,391	76,367	48,847	Gross loss	(27,631)	(29,257)	(50,328)	(28,826)	Gross loss	(125,503)	(30,169)	(175,831)	(58,995)			
Gross loss	Gross loss	(27,631)	(29,257)	(50,328)	(28,826)	Operating expenses:	40,203	46,781	73,223	46,781	Operating expenses:	122,679	54,080	195,902	100,861	Operating expenses:	122,679	54,080	195,902	100,861			
Operating expenses:	Operating expenses:	140,995	142,974	245,498	294,714	Research and development	64,514	63,106	126,320	137,663	Research and development	41,966	66,683	168,286	204,346	Research and development	41,966	66,683	168,286	204,346			
Research and development	Research and development	140,995	142,974	245,498	294,714	Selling, general, and administrative	58,764	79,868	101,461	157,051	Selling, general, and administrative	57,982	132,865	159,443	289,916	Selling, general, and administrative	57,982	132,865	159,443	289,916			
Selling, general, and administrative	Selling, general, and administrative	17,717	—	17,717	—	Loss on supplier deposits	17,717	—	17,717	—	Loss on supplier deposits	716	—	18,433	—	Loss on supplier deposits	716	—	18,433	—			
Loss on supplier deposits	Loss on supplier deposits	140,995	142,974	245,498	294,714	Total operating expenses	100,664	199,548	346,162	494,262	Total operating expenses	100,664	199,548	346,162	494,262	Total operating expenses	100,664	199,548	346,162	494,262			
Total operating expenses	Total operating expenses	140,995	142,974	245,498	294,714	Loss from operations	(168,626)	(172,231)	(295,826)	(323,540)	Loss from operations	(226,167)	(229,717)	(521,993)	(553,257)	Loss from operations	(226,167)	(229,717)	(521,993)	(553,257)			
Loss from operations	Loss from operations	(168,626)	(172,231)	(295,826)	(323,540)	Other income (expense):	Interest expense, net	(8,749)	(2,808)	(18,582)	(3,019)	Other income (expense):	Interest expense, net	(52,680)	(7,735)	(71,262)	(10,754)	Other income (expense):	Interest expense, net	(52,680)	(7,735)	(71,262)	(10,754)
Other income (expense):	Other income (expense):	Interest expense, net	(8,749)	(2,808)	(18,582)	(3,019)	Revaluation of warrant liability	41	3,341	315	2,907	Revaluation of warrant liability	—	586	315	3,493	Revaluation of warrant liability	—	586	315	3,493		
Interest expense, net	Interest expense, net	140,995	142,974	245,498	294,714	Gain on divestiture of affiliate	70,849	—	70,849	—	Gain on divestiture of affiliate	—	—	70,849	—	Gain on divestiture of affiliate	—	—	70,849	—			
Revaluation of warrant liability	Revaluation of warrant liability	140,995	142,974	245,498	294,714	Loss on debt extinguishment	(20,362)	—	(20,362)	—	Loss on debt extinguishment	—	—	(20,362)	—	Loss on debt extinguishment	—	—	(20,362)	—			
Gain on divestiture of affiliate	Gain on divestiture of affiliate	140,995	142,974	245,498	294,714	Other income (expense), net	(5,546)	(27)	(5,630)	1,806	Other income (expense), net	(146,654)	2,617	(152,284)	4,423	Other income (expense), net	(146,654)	2,617	(152,284)	4,423			
Loss before income taxes and equity in net loss of affiliates	Loss before income taxes and equity in net loss of affiliates	140,995	142,974	245,498	294,714	Loss before income taxes and equity in net loss of affiliates	(132,393)	(171,725)	(269,236)	(321,846)	Loss before income taxes and equity in net loss of affiliates	(425,501)	(234,249)	(694,737)	(556,095)	Loss before income taxes and equity in net loss of affiliates	(425,501)	(234,249)	(694,737)	(556,095)			
Income tax expense	Income tax expense	140,995	142,974	245,498	294,714	Loss before equity in net loss of affiliates	—	2	—	2	Income tax expense	—	1	1	3	Income tax expense	—	1	1	3			
Loss before equity in net loss of affiliates	Loss before equity in net loss of affiliates	140,995	142,974	245,498	294,714	Equity in net loss of affiliates	(132,393)	(171,727)	(269,236)	(321,848)	Loss before equity in net loss of affiliates	(425,502)	(234,250)	(694,738)	(556,098)	Equity in net loss of affiliates	(425,502)	(234,250)	(694,738)	(556,098)			
Net loss from continuing operations	Net loss from continuing operations	140,995	142,974	245,498	294,714	Equity in net loss of affiliates	(7,617)	(1,270)	(16,025)	(4,090)	Net loss from continuing operations	(425,764)	(236,234)	(711,025)	(562,172)	Equity in net loss of affiliates	(262)	(1,984)	(16,287)	(6,074)			
Net loss from continuing operations	Net loss from continuing operations	140,995	142,974	245,498	294,714	Net loss from continuing operations	(140,010)	(172,997)	(285,261)	(325,938)	Net loss from continuing operations	(425,764)	(236,234)	(711,025)	(562,172)	Net loss from continuing operations	(425,764)	(236,234)	(711,025)	(562,172)			

Discontinued operations:		Discontinued operations:				Discontinued operations:	
Loss from discontinued operations	Loss from discontinued operations	(52,883)	—	(76,726)	—	Loss from discontinued operations	—
Loss from deconsolidation of discontinued operations	Loss from deconsolidation of discontinued operations	(24,935)	—	(24,935)	—	Loss from deconsolidation of discontinued operations	—
Net loss from discontinued operations	Net loss from discontinued operations	(77,818)	—	(101,661)	—	Net loss from discontinued operations	—
Net loss	Net loss	\$ (217,828)	\$ (172,997)	\$ (386,922)	\$ (325,938)	Net loss	\$ (425,764)
Basic and diluted net loss per share:	Basic and diluted net loss per share:					Basic and diluted net loss per share:	
Net loss from continuing operations	Net loss from continuing operations	\$ (0.20)	\$ (0.41)	\$ (0.45)	\$ (0.78)	Net loss from continuing operations	\$ (0.50)
Net loss from discontinued operations	Net loss from discontinued operations	\$ (0.11)	\$ —	\$ (0.16)	\$ —	Net loss from discontinued operations	\$ —
Net loss	Net loss	\$ (0.31)	\$ (0.41)	\$ (0.61)	\$ (0.78)	Net loss	\$ (0.50)
Weighted-average shares outstanding, basic and diluted	Weighted-average shares outstanding, basic and diluted	708,692,817	425,323,391	629,630,362	420,266,181	Weighted-average shares outstanding, basic and diluted	857,213,992
						basic and diluted	438,416,393
						706,325,212	426,382,736

See accompanying notes to the consolidated financial statements.

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NIKOLA CORPORATION
CONSOLIDATED STATEMENTS OF COMPREHENSIVE LOSS

(In thousands)
(Unaudited)

		Three Months Ended		Six Months Ended		Three Months Ended		Nine Months Ended	
		June 30,		June 30,		September 30,		September 30,	
		2023	2022	2023	2022	2023	2022	2023	2022
Net loss	Net loss	\$ (217,828)	\$ (172,997)	\$ (386,922)	\$ (325,938)	Net loss	\$ (425,764)	\$ (236,234)	\$ (812,686)
Other comprehensive income (loss):	Other comprehensive income (loss):					Other comprehensive income (loss):			
Foreign currency translation adjustment, net of tax	Foreign currency translation adjustment, net of tax	1,537	(1,318)	1,484	(989)	Foreign currency translation adjustment, net of tax	145	(1,237)	1,629
Comprehensive loss	Comprehensive loss	\$ (216,291)	\$ (174,315)	\$ (385,438)	\$ (326,927)	Comprehensive loss	\$ (425,619)	\$ (237,471)	\$ (811,057)
									\$ (564,398)

See accompanying notes to the consolidated financial statements.

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NIKOLA CORPORATION
CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY
(In thousands, except share data)
(Uaudited)

	Three Months Ended June 30, 2023							Three Months Ended September 30, 2023							
	Common Stock		Additional Paid-in Capital		Accumulated Deficit		Other In Share (Loss)	Total Stockholders' Equity	Common Stock		Additional Paid-in Capital		Accumulated Deficit		Other Comprehensive Income (Loss)
	Shares	Amount	Capital	Deficit	Share (Loss)	Total			Shares	Amount	Capital	Deficit	Share (Loss)	Total	
Balance as of March 31, 2023	594,182,551	\$ 59	\$ 2,751,386	\$ (2,203,944)	\$ (1,630)	\$ 545,871									
Balance as of June 30, 2023							Balance as of June 30, 2023	769,300,317	\$ 77	\$ 2,944,504	\$ (2,421,772)	\$ (93)			
Exercise of stock options	Exercise of stock options	600,006	—	636	—	—	Exercise of stock options	5,967,257	1	6,352	—	—	—	—	—
Issuance of shares for RSU awards	Issuance of shares for RSU awards	4,982,981	—	—	—	—	Issuance of shares for RSU awards	3,143,110	—	—	—	—	—	—	—
Common stock issued under Tumim Purchase Agreements		3,289,301	1	2,874	—	—	2,875								
Common stock issued under Equity Distribution Agreement, net	Common stock issued under Equity Distribution Agreement, net	22,007,305	2	30,840	—	—	30,842	Common stock issued under Equity Distribution Agreement, net	27,662,880	3	53,136	—	—	—	—
Issuance of common stock upon conversion of 5% Senior Convertible Notes		54,952,459	6	39,674	—	—	39,680	Issuance of common stock upon conversion of Senior Convertible Notes	134,101,626	13	139,237	—	—	—	—
Common stock issued in public offering		29,910,715	3	32,241	—	—	32,244	Common stock issued for conversion of April 2023 Toggle Convertible Notes	72,458,789	7	115,145	—	—	—	—
Common stock issued in registered direct offering		59,374,999	6	63,150	—	—	63,156	Common stock received for contingent stock consideration	(20,600,000)	(2)	—	(69,937)	—	—	—
Issuance of common stock upon conversion of Senior Convertible Notes							Reclassification of conversion features embedded in Toggle Convertible Notes to equity								
Common stock issued for conversion of April 2023 Toggle Convertible Notes							Reclassification of conversion features embedded in Toggle Convertible Notes to equity								
Common stock received for contingent stock consideration							Reclassification of conversion features embedded in Toggle Convertible Notes to equity								
Reclassification of conversion features embedded in Toggle Convertible Notes to equity							Reclassification of share-based payment awards from liability to equity								
Reclassification of share-based payment awards from liability to equity							Reclassification of share-based payment awards from liability to equity								

Reclassification of share-based payment awards from equity to liability						Reclassification of share-based payment awards from equity to liability			
Stock-based compensation	Stock-based compensation	—	—	25,709	—	—	25,709	Stock-based compensation	—
Reclassification of awards from equity to liability		—	—	(2,006)	—	—	(2,006)		—
Net loss	Net loss	—	—	—	(217,828)	—	(217,828)	Net loss	—
Other comprehensive loss	Other comprehensive loss	—	—	—	—	1,537	1,537	Other comprehensive loss	—
Balance as of June 30, 2023	769,300,317	\$ 77	\$ 2,944,504	\$ (2,421,772)	\$ (93)	\$ 522,716		Balance as of September 30, 2023	992,033,979
									\$ 99
									\$ 3,520,890
									\$ (2,917,473)
									\$ 52

See accompanying notes to the consolidated financial statements.

Six Months Ended June 30, 2023										Nine Months Ended September 30, 2023											
	Balance as of December 31, 2022	Common Stock					Accumulated Other					Common Stock					Accumulated Other				
		Common Stock		Additional Paid-in Capital		Accumulated Deficit	Other		Comprehensive Income (Loss)	Stockholders' Equity	Common Stock		Additional Paid-in Capital		Accumulated Deficit	Other		Comprehensive Income (Loss)			
		Shares	Amount	Capital	Deficit						Amount										
Balance as of December 31, 2022	Balance as of December 31, 2022	512,935,485	\$ 51	\$ 2,562,855	\$ (2,034,850)		\$ (1,577)	\$ 526,479		Balance as of December 31, 2022	512,935,485	\$ 51	\$ 2,562,855	\$ (2,034,850)	\$ (1,577)						
Exercise of stock options	Exercise of stock options	756,372	—	802	—	—	—	802	Exercise of stock options	6,723,629	1	7,154	—	—	—	—	—	—	—		
Issuance of shares for RSU awards	Issuance of shares for RSU awards	7,772,641	1	—	—	—	—	1	Issuance of shares for RSU awards	10,915,751	—	—	—	—	—	—	—	—	—		
Common stock issued under Tumim Purchase Agreements	Common stock issued under Tumim Purchase Agreements	32,211,777	3	67,584	—	—	—	67,587	Common stock issued under Tumim Purchase Agreements	32,211,777	3	67,584	—	—	—	—	—	—	—		
Common stock issued under Equity Distribution Agreement, net	Common stock issued under Equity Distribution Agreement, net	39,027,563	4	62,450	—	—	—	62,454	Common stock issued under Equity Distribution Agreement, net	66,690,443	7	115,586	—	—	—	—	—	—	—		
Issuance of common stock upon conversion of 5% Senior Convertible Notes	Issuance of common stock upon conversion of 5% Senior Convertible Notes	87,310,765	9	107,171	—	—	—	107,180	Issuance of common stock upon conversion of Senior Convertible Notes	221,412,391	23	246,408	—	—	—	—	—	—	—		

Common stock issued in public offering	Common stock issued in public offering	29,910,715	3	32,241	—	—	32,244	Common stock issued in public offering	29,910,715	3	32,241	—	—
Common stock issued in registered direct offering	Common stock issued in registered direct offering	59,374,999	6	63,150	—	—	63,156	Common stock issued in registered direct offering	59,374,999	6	63,150	—	—
Common stock issued for conversion of April 2023 Toggle Convertible Notes	Common stock received for contingent stock consideration	—	—	—	—	—	—	Common stock issued for conversion of April 2023 Toggle Convertible Notes	72,458,789	7	115,145	—	—
Reclassification of conversion features embedded in Toggle Convertible Notes to equity	Reclassification of share-based payment awards from liability to equity	—	—	—	—	—	—	Common stock received for contingent stock consideration	(20,600,000)	(2)	—	(69,937)	—
Reclassification of share-based payment awards from equity to liability	Stock-based compensation	—	—	50,257	—	—	50,257	Stock-based compensation	—	—	241,851	—	—
Reclassification of awards from equity to liability	—	—	(2,006)	—	—	—	(2,006)	—	—	—	—	—	—
Net loss	Net loss	—	—	—	(386,922)	—	(386,922)	Net loss	—	—	—	(812,686)	—
Other comprehensive loss	Other comprehensive loss	—	—	—	—	1,484	1,484	Other comprehensive loss	—	—	—	—	1,629
Balance as of June 30, 2023		769,300,317	\$ 77	\$ 2,944,504	\$ (2,421,772)	\$ (93)	\$ 522,716	Balance as of September 30, 2023					52

See accompanying notes to the consolidated financial statements.

	Three Months Ended June 30, 2022 <i>Accumulated</i>						Three Months Ended September 30, 2022 <i>Accumulated</i>					
	Common Stock		Additional Paid-in Capital		Other Accumulated Deficit		Comprehensive Stockholders' Equity		Common Stock		Additional Paid-in Capital	
	Shares	Amount	Capital	Deficit	Share	Loss	Equity	Amount	Capital	Deficit	Share	Loss
	418,244,072	\$ 42	\$ 2,025,552	\$ (1,402,552)	\$ 131	\$ 622,172						
	418,244,072	\$ 42	\$ 2,025,552	\$ (1,402,552)	\$ 131	\$ 622,172						

Balance as of March 31, 2022										Balance as of June 30, 2022										
Balance as of June 30, 2022										Balance as of June 30, 2022										
Exercise of stock options	Exercise of stock options	105,754	—	257	—	—	—	257	Exercise of stock options	1,296,206	1	1,404	—	—	—	—	—	—	—	
Issuance of shares for RSU awards	Issuance of shares for RSU awards	1,420,658	—	—	—	—	—	—	Issuance of shares for RSU awards	1,425,182	—	—	—	—	—	—	—	—	—	
Common stock issued under Tumim Purchase Agreements		13,604,600	1	96,295	—	—	—	96,296												
Common stock issued under Equity Distribution Agreement, net									Common stock issued under Equity Distribution Agreement, net	19,009,227	2	97,997	—	—	—	—	—	—	—	
Stock-based compensation	Stock-based compensation	—	—	54,841	—	—	—	54,841	Stock-based compensation	—	—	102,845	—	—	—	—	—	—	—	
Net loss	Net loss	—	—	—	(172,997)	—	—	(172,997)	Net loss	—	—	—	(236,234)	—	—	—	—	—	—	
Other comprehensive loss	Other comprehensive loss	—	—	—	—	—	(1,318)	(1,318)	Other comprehensive loss	—	—	—	—	—	—	—	—	(1,237)	—	
Balance as of June 30, 2022										433,475,084	\$ 43	\$ 2,176,945	\$ (1,576,550)	\$ (1,187)	\$ 599,251					
Balance as of September 30, 2022										Balance as of September 30, 2022										
										455,205,699	\$ 46	\$ 2,379,191	\$ (1,812,784)	\$ (2,424)						

Six Months Ended June 30, 2022										Nine Months Ended September 30, 2022										
		Common Stock	Additional Paid-in Capital	Accumulated Deficit	Other <small>Inc. Share (Loss)</small>	Total				Common Stock	Additional Paid-in Capital	Accumulated Deficit	Other <small>Comprehensive Income (Loss)</small>							
		Shares	Amount	Capital	Deficit	Stockholders' Equity				Amount										
Balance as of December 31, 2021	Balance as of December 31, 2021	413,340,550	\$ 41	\$ 1,944,341	\$ (1,250,612)	\$ (198)	\$ 693,572		Balance as of December 31, 2021	413,340,550	\$ 41	\$ 1,944,341	\$ (1,250,612)	\$ (198)						
Exercise of stock options	Exercise of stock options	285,585	—	565	—	—	565		Exercise of stock options	1,581,791	1	1,969	—	—	—	—	—	—	—	
Issuance of shares for RSU awards	Issuance of shares for RSU awards	2,600,705	—	—	—	—	—		Issuance of shares for RSU awards	4,025,887	—	—	—	—	—	—	—	—	—	
Common stock issued under Tumim Purchase Agreements	Common stock issued under Tumim Purchase Agreements	17,248,244	2	123,670	—	—	123,672		Common stock issued under Tumim Purchase Agreements	17,248,244	2	123,670	—	—	—	—	—	—	—	
Common stock issued under Equity Distribution Agreement, net									Common stock issued under Equity Distribution Agreement, net	19,009,227	2	97,997	—	—	—	—	—	—	—	
Stock-based compensation	Stock-based compensation	—	—	108,369	—	—	108,369		Stock-based compensation	—	—	211,214	—	—	—	—	—	—	—	
Net loss	Net loss	—	—	—	(325,938)	—	(325,938)		Net loss	—	—	—	(562,172)	—	—	—	—	—	—	
Other comprehensive loss	Other comprehensive loss	—	—	—	—	(989)	(989)		Other comprehensive loss	—	—	—	(2,226)	—	—	—	—	—	—	
Balance as of June 30, 2022										433,475,084	\$ 43	\$ 2,176,945	\$ (1,576,550)	\$ (1,187)	\$ 599,251					

Balance as of September 30, 2022	Balance as of September 30, 2022	455,205,699	\$46	\$2,379,191	\$ (1,812,784)	\$ (2,424)
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See accompanying notes to the consolidated financial statements.

NIKOLA CORPORATION
CONSOLIDATED STATEMENTS OF CASH FLOWS
 (In thousands)
 (Unaudited)

	Cash flows from operating activities	Six Months Ended June 30,		Nine Months Ended September 30,	
		2023	2022	2023	2022
Net loss	Net loss	\$ (386,922)	\$ (325,938)	Net loss	\$ (812,686)
Less: Loss from discontinued operations	Less: Loss from discontinued operations	(101,661)	—	Less: Loss from discontinued operations	(101,661)
Loss from continuing operations	Loss from continuing operations	(285,261)	(325,938)	Loss from continuing operations	(711,025)
Adjustments to reconcile net loss to net cash used in operating activities:				Adjustments to reconcile net loss from continuing operations to net cash used in operating activities:	
Adjustments to reconcile net loss from continuing operations to net cash used in operating activities:				Adjustments to reconcile net loss from continuing operations to net cash used in operating activities:	
Depreciation and amortization	Depreciation and amortization	11,762	9,676	Depreciation and amortization	28,758
Stock-based compensation	Stock-based compensation	50,257	108,369	Stock-based compensation	68,916
Equity in net loss of affiliates	Equity in net loss of affiliates	16,025	4,090	Equity in net loss of affiliates	16,287
Revaluation of financial instruments	Revaluation of financial instruments	7,906	192	Revaluation of financial instruments	195,132
Revaluation of contingent stock consideration	Revaluation of contingent stock consideration	(2,472)	—	Revaluation of contingent stock consideration	(43,981)
Inventory write-downs	Inventory write-downs	12,718	10,890	Inventory write-downs	64,500
Non-cash interest expense	Non-cash interest expense	19,363	2,457	Non-cash interest expense	72,846
Loss on supplier deposits	Loss on supplier deposits	17,717	—	Loss on supplier deposits	18,433
Gain on divestiture of affiliate	Gain on divestiture of affiliate	(70,849)	—	Gain on divestiture of affiliate	(70,849)
Loss on debt extinguishment	Loss on debt extinguishment	20,362	—	Loss on debt extinguishment	20,362
Other non-cash activity	Other non-cash activity	1,015	273	Other non-cash activity	3,888
Changes in operating assets and liabilities:				Changes in operating assets and liabilities:	
Accounts receivable, net	Accounts receivable, net	11,640	(16,726)	Accounts receivable, net	20,932
					(37,662)

Inventory	Inventory	11,725	(60,468)	Inventory	(9,983)	(97,952)
Prepaid expenses and other current assets	Prepaid expenses and other current assets	(48,583)	(12,631)	Prepaid expenses and other current assets	(48,332)	(10,371)
Other assets	Other assets	(2,041)	(608)	Other assets	(2,384)	(912)
Accounts payable, accrued expenses and other current liabilities	Accounts payable, accrued expenses and other current liabilities	(59,474)	15,395	Accounts payable, accrued expenses and other current liabilities	(1,672)	25,128
Long-term deposits	Long-term deposits	(1,293)	(8,281)	Long-term deposits	(1,377)	(8,356)
Operating lease liabilities	Operating lease liabilities	(779)	(277)	Operating lease liabilities	(1,191)	(416)
Other long-term liabilities	Other long-term liabilities	3,097	(224)	Other long-term liabilities	2,316	1,605
Net cash used in operating activities	Net cash used in operating activities	(287,165)	(273,811)	Net cash used in operating activities	(378,424)	(431,459)
Cash flows from investing activities	Cash flows from investing activities			Cash flows from investing activities		
Purchases and deposits of property, plant and equipment	Purchases and deposits of property, plant and equipment	(87,719)	(67,316)	Purchases and deposits of property, plant and equipment	(108,409)	(118,436)
Divestiture of affiliate	Divestiture of affiliate	35,000	—	Divestiture of affiliate	35,000	—
Proceeds from the sale of assets				Proceeds from the sale of assets	20,742	18
Payments to Assignee	Payments to Assignee	(2,724)	—	Payments to Assignee	(2,725)	—
Investments in affiliates	Investments in affiliates	(84)	(23,027)	Investments in affiliates	(250)	(23,027)
Issuance of senior secured note receivable and prepaid acquisition-related consideration				Issuance of senior secured note receivable and prepaid acquisition-related consideration	—	(21,910)
Settlement of Second Price Differential				Settlement of Second Price Differential	—	(6,588)
Net cash used in investing activities	Net cash used in investing activities	(55,527)	(90,343)	Net cash used in investing activities	(55,642)	(169,943)

See accompanying notes to the consolidated financial statements.

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Cash flows from financing activities	Cash flows from financing activities		Cash flows from financing activities			
Proceeds from the exercise of stock options	Proceeds from the exercise of stock options	1,040	565	Proceeds from the exercise of stock options	7,393	1,645
Proceeds from issuance of shares under the Tumim	Proceeds from issuance of shares under the Tumim			Proceeds from issuance of shares under the Tumim		
Purchase Agreements	Purchase Agreements	67,587	123,672	Purchase Agreements	67,587	123,672
Proceeds from registered direct offering, net of underwriters discount		63,806	—			
Proceeds from public offering, net of underwriters discount		32,244	—			

Proceeds from registered direct offering, net of underwriter's discount		Proceeds from registered direct offering, net of underwriter's discount	63,456	—
Proceeds from public offering, net of underwriter's discount		Proceeds from public offering, net of underwriter's discount	32,244	—
Proceeds from issuance of common stock under Equity Distribution Agreement, net of commissions paid	Proceeds from issuance of common stock under Equity Distribution Agreement, net of commissions paid	61,565	—	100,512
Proceeds from issuance of convertible notes, net of discount and issuance costs	Proceeds from issuance of convertible notes, net of discount and issuance costs	52,075	183,510	183,504
Proceeds from issuance of Collateralized Promissory Notes	Proceeds from issuance of Collateralized Promissory Notes	—	50,000	54,000
Proceeds from issuance of financing obligation, net of issuance costs	Proceeds from issuance of financing obligation, net of issuance costs	49,605	38,582	44,007
Proceeds from insurance premium financing	Proceeds from insurance premium financing	3,909	—	6,637
Repayment of debt and promissory notes	Repayment of debt and promissory notes	(5,057)	(25,000)	(28,125)
Payments on insurance premium financing	Payments on insurance premium financing	(2,381)	—	(2,635)
Payments on finance lease liabilities and financing obligation	Payments on finance lease liabilities and financing obligation	(255)	(192)	(266)
Net cash provided by financing activities	Net cash provided by financing activities	324,138	371,137	482,951
Net increase (decrease) in cash and cash equivalents, including restricted cash and cash equivalents	Net increase (decrease) in cash and cash equivalents, including restricted cash and cash equivalents	(18,554)	6,983	78,191
Cash and cash equivalents, including restricted cash and cash equivalents, beginning of period	Cash and cash equivalents, including restricted cash and cash equivalents, beginning of period	313,909	522,241	522,241
Cash and cash equivalents, including restricted cash and cash equivalents, end of period	Cash and cash equivalents, including restricted cash and cash equivalents, end of period \$	295,355	\$ 529,224	\$ 403,790
Cash flows from discontinued operations:	Cash flows from discontinued operations:			
Operating activities	Operating activities	(4,964)	—	—
Investing activities	Investing activities	(1,804)	—	—
Financing activities	Financing activities	(572)	—	—
Net cash used in discontinued operations	Net cash used in discontinued operations \$	(7,340)	\$ —	\$ —
Supplementary cash flow disclosures:	Supplementary cash flow disclosures:			
Cash paid for interest	Cash paid for interest \$	2,881	\$ 953	\$ 2,643
Cash interest received	Cash interest received \$	3,595	\$ 100	\$ 257

<u>Supplementary disclosures for noncash investing and financing activities:</u>	<u>Supplementary disclosures for noncash investing and financing activities:</u>	<u>Supplementary disclosures for noncash investing and financing activities:</u>
Conversion of 5% Senior Convertible Notes into common stock	\$ 107,180	\$ —
Conversion of Senior Convertible Notes into common stock		Conversion of Senior Convertible Notes into common stock \$ 246,431
Reclassification of conversion features embedded in Toggle Convertible Notes to equity		Reclassification of conversion features embedded in Toggle Convertible Notes to equity \$ 241,851
Conversion of April 2023 Toggle Convertible Notes		Conversion of April 2023 Toggle Convertible Notes \$ 115,152
Contingent stock consideration for divestiture of affiliate	Contingent stock consideration for divestiture of affiliate \$ 25,956	Contingent stock consideration for divestiture of affiliate \$ 25,956
Embedded derivative liability bifurcated from April 2023 Toggle Convertible Notes	Embedded derivative liability bifurcated from April 2023 Toggle Convertible Notes \$ 21,180	Embedded derivative liability bifurcated from April 2023 Toggle Convertible Notes \$ 21,180
Reclassification from liability to equity for certain share-based awards		Reclassification from liability to equity for certain share-based awards \$ 20,992
PIK interest		PIK interest \$ 16,263
Purchases of property, plant and equipment included in liabilities	Purchases of property, plant and equipment included in liabilities \$ 19,785	Purchases of property, plant and equipment included in liabilities \$ 13,551
PIK interest	\$ 14,174	\$ 1,784
Leased assets obtained in exchange for new finance lease liabilities		Leased assets obtained in exchange for new finance lease liabilities \$ 10,982
Reclassification from equity to liability for certain share-based awards	Reclassification from equity to liability for certain share-based awards \$ 2,006	Reclassification from equity to liability for certain share-based awards \$ 10,401
Accrued commissions under Equity Distribution Agreement	Accrued commissions under Equity Distribution Agreement \$ 791	Accrued commissions under Equity Distribution Agreement \$ 1,114
Accrued issuance costs		Accrued issuance costs \$ 300
Embedded derivative asset bifurcated from June 2022	Embedded derivative asset bifurcated from June 2022	Embedded derivative asset bifurcated from June 2022
Toggle Convertible Notes	Toggle Convertible Notes \$ —	Toggle Convertible Notes \$ 1,500
Stock option proceeds receivable		Stock option proceeds receivable \$ —
Accrued debt issuance costs	Accrued debt issuance costs \$ —	Accrued debt issuance costs \$ —
Leased assets obtained in exchange for new finance lease liabilities	\$ —	\$ 692
Accrued deferred issuance costs		Accrued deferred issuance costs \$ —

See accompanying notes to the consolidated financial statements.

**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
(UNAUDITED)**

1. BASIS OF PRESENTATION

(a) Overview

Nikola Corporation ("Nikola" or the "Company") is a designer and manufacturer of heavy-duty commercial battery-electric and hydrogen-electric vehicles and energy infrastructure solutions.

(b) Unaudited Consolidated Financial Statements

The accompanying unaudited consolidated financial statements have been prepared in accordance with U.S. Generally Accepted Accounting Principles ("GAAP") and pursuant to the regulations of the U.S. Securities and Exchange Commission ("SEC"). The unaudited financial information reflects, in the opinion of management, all adjustments, consisting of normal recurring adjustments, considered necessary for a fair statement of the Company's financial position, results of operations and cash flows for the periods indicated. The results reported for the interim period presented are not necessarily indicative of results that may be expected for the full year. These consolidated financial statements should be read in conjunction with the audited consolidated financial statements and notes thereto included in the Company's Annual Report on Form 10-K for the year ended December 31, 2022, as amended.

The consolidated financial statements include the accounts of the Company and its wholly-owned subsidiaries. Intercompany accounts and transactions have been eliminated.

Certain prior period balances have been reclassified to conform to the current period presentation in the consolidated financial statements and the accompanying notes. All dollar amounts are in thousands, unless otherwise noted.

Prior to the start of production for the Tre BEV trucks late in the first quarter of 2022, pre-production activities, including manufacturing readiness, process validation, prototype builds, freight, inventory write-downs, and operations of the Company's manufacturing facility in Coolidge, Arizona were recorded as research and development activities on the Company's consolidated statements of operations. Commensurate with the start of production, manufacturing costs, including labor and overhead, as well as inventory-related expenses related to the Tre BEV trucks, and related facility costs, are recorded in cost of revenues beginning in the second quarter of 2022.

The preparation of financial statements in conformity with GAAP requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

On October 14, 2022, the Company completed the acquisition of all of the outstanding common stock of Romeo Power, Inc. ("Romeo") (the "Romeo Acquisition") for a total purchase price of \$78.6 million. See Note 3, *Business Combination*. On June 30, 2023, pursuant to a general assignment (the "Assignment"), the Company transferred ownership of all of Romeo's right, title and interest in and to all of its tangible and intangible assets, subject to certain agreed upon exclusions (collectively, the "Assets") to SG Service Co., LLC, in its sole and limited capacity as Assignee for the Benefit of Creditors of Romeo ("Assignee"), and also designated Assignee to act as the assignee for the benefit of creditors of Romeo, such that as of June 30, 2023, Assignee succeeded to all of Romeo's right, title and interest in and to the Assets. The results of operations of Romeo are reported as discontinued operations for the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023**. See Note 10, *Deconsolidation of Subsidiary*, for additional information.

All references made to financial data in this Quarterly Report on Form 10-Q are to the Company's continuing operations, unless otherwise specifically noted.

(c) Funding Risks and Going Concern

In accordance with Accounting Standards Codification ("ASC") 205-40, *Disclosure of Uncertainties about an Entity's Ability to Continue as a Going Concern* ("ASC 205-40") the Company has evaluated whether there are conditions and events, considered in the aggregate, that raise substantial doubt about the Company's ability to continue as a going concern within one year after the date that the consolidated financial statements are issued.

As an early stage growth company, the Company's ability to access capital is critical. Until the Company can generate sufficient revenue to cover its operating expenses, working capital and capital expenditures, the Company will need to raise

**NIKOLA CORPORATION
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
(UNAUDITED)**

additional capital. Additional stock financing may not be available on favorable terms, or at all, and would be dilutive to current stockholders. Debt financing, if available, may involve restrictive covenants and dilutive financing instruments.

The Company has secured and intends to employ various strategies to obtain the required funding for future operations such as continuing to access capital through the amended and restated equity distribution agreement with Citigroup Global Markets Inc. ("Citi"), as sales agent, see Note 8, *Capital Structure*, the second common stock purchase agreement with Turnum Stone Capital LLC, see Note 8, *Capital Structure*, and the securities purchase agreement with investors for the sale of an additional principal amount of unsecured senior convertible notes, see Note 7, *Debt and Finance Lease Liabilities*. However, the ability to access the amended and restated equity distribution agreement and second common stock purchase agreement are dependent on common stock trading volumes and the market price of the Company's common stock, and registration of additional shares. The Company's amendment to the Second Amended and Restated Certificate of Incorporation to increase the number of authorized shares of common stock from 800,000,000 to 1,600,000,000, was approved by the stockholders at the Company's annual meeting of stockholders on August 3, 2023; however, the ability to access the remaining availability of the equity distribution agreement and second common stock purchase agreement which cannot be assured, and as a result cannot be included as sources of liquidity for the Company's ASC 205-40 analysis.

If capital is not available to the Company when, and in the amounts needed, the Company would be required to delay, scale back, or abandon some or all of its development programs and operations, which could materially harm the Company's business, financial condition and results of operations. The result of the Company's ASC 205-40 analysis, due to uncertainties discussed above, is that there is substantial doubt about the Company's ability to continue as a going concern through the next twelve months from the date of issuance of these consolidated financial statements.

These financial statements have been prepared by management in accordance with GAAP and this basis assumes that the Company will continue as a going concern, which contemplates the realization of assets and the satisfaction of liabilities and commitments in the normal course of business. These financial statements do not include any adjustments that may result from the outcome of this uncertainty.

2. SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

(a) Cash, Cash Equivalents and Restricted Cash and Cash Equivalents

The Company considers all highly liquid investments purchased with a remaining maturity of three months or less to be cash equivalents. Additionally, the Company considers investments in money market funds to be cash equivalents. As of June 30, 2023 September 30, 2023 and December 31, 2022, the Company had \$68.7 million \$362.9 million and \$225.9 million of cash and cash equivalents, respectively. Cash equivalents included \$14.3 million and zero of highly liquid investments as of September 30, 2023 and December 31, 2022, respectively.

As of September 30, 2023 and December 31, 2022, the Company had \$29.3 million and \$88.1 million, respectively, in current and non-current restricted cash. Restricted cash represents cash that is restricted as to withdrawal or usage and primarily consists of securitization of the Company's letters of credit, leases, and debt. See Note 7, *Debt and Finance Lease Liabilities*, for additional details.

The reconciliation of cash and cash equivalents and restricted cash and cash equivalents to amounts presented in the consolidated statements of cash flows are as follows:

		As of			As of				
		June 30, 2023		December 31, 2022	June 30, 2022	September 30, 2023		December 31, 2022	September 30, 2022
		Cash and cash equivalents	Restricted cash and cash equivalents - current	Restricted cash and cash equivalents - non-current	Cash, cash equivalents and restricted cash and cash equivalents	Cash and cash equivalents	Restricted cash and cash equivalents - current	Restricted cash and cash equivalents - non-current	Cash, cash equivalents and restricted cash and cash equivalents
Cash and cash equivalents	Cash and cash equivalents	\$ 226,673	\$ 225,850	\$ 441,765		\$ 362,850	\$ 225,850	\$ 315,731	
Restricted cash and cash equivalents - current	Restricted cash and cash equivalents - current	600	10,600	—		1,224	10,600	600	
Restricted cash and cash equivalents - non-current	Restricted cash and cash equivalents - non-current	68,082	77,459	87,459		28,026	77,459	87,459	
Cash, cash equivalents and restricted cash and cash equivalents	Cash, cash equivalents and restricted cash and cash equivalents	\$ 295,355	\$ 313,909	\$ 529,224		\$ 392,100	\$ 313,909	\$ 403,790	

NIKOLA CORPORATION
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
(UNAUDITED)

(b) Fair Value of Financial Instruments

The carrying value and fair value of the Company's financial instruments are as follows:

Assets	Assets	As of June 30, 2023				As of September 30, 2023			
		Level 1	Level 2	Level 3	Total	Level 1	Level 2	Level 3	Total
Cash equivalents - money market						Cash equivalents - money market	\$ 14,339	\$ —	\$ — \$ 14,339
Derivative asset	Derivative asset	\$ —	\$ —	\$ 109	\$ 109	Derivative asset	—	—	124 124
Liabilities	Liabilities					Liabilities			
Warrant liability	Warrant liability	\$ —	\$ —	\$ 65	\$ 65	Warrant liability	\$ —	\$ —	\$ 65 \$ 65
Derivative liability		—	—	29,340	29,340				
Liability classified awards		2,006	—	—	2,006				

Senior Convertible Notes		Senior Convertible Notes	—	—	32,381	32,381				
		As of December 31, 2022								
Assets	Assets	Level 1	Level 2	Level 3	Total	Assets	Level 1	Level 2	Level 3	Total
Derivative asset	Derivative asset	\$ —	\$ —	\$ 170	\$ 170	Derivative asset	\$ —	\$ —	\$ 170	\$ 170
Liabilities	Liabilities					Liabilities				
Warrant liability	Warrant liability	\$ —	\$ —	\$ 380	\$ 380	Warrant liability	\$ —	\$ —	\$ 380	\$ 380
5% Senior Convertible Notes		—	—	50,000	50,000	Senior Convertible Notes	—	—	50,000	50,000
Senior Convertible Notes										

Put premium derivative asset Premium Derivative Asset

In June 2022, the Company completed a private placement of \$200.0 million aggregate principal amount of unsecured 8.00% / 11.00% convertible senior paid in kind ("PIK") toggle notes (the "June 2022 Toggle Convertible Notes"). In conjunction with the issuance of the June 2022 Toggle Convertible Notes, the Company entered into a premium letter agreement (the "Put Premium") with the purchasers (the "Note Purchasers") of the June 2022 Toggle Convertible Notes which requires the Note Purchasers to pay \$9.0 million to the Company if during the period through the date that is thirty months after the closing date of the private placement of June 2022 Toggle Convertible Notes, the last reported sale price of the Company's common stock has been at least \$20.00 for at least 20 trading days during any consecutive 40 trading day period.

The Put Premium was determined to be an embedded derivative asset and met the criteria to be separated from the host contract and carried at fair value. The derivative is measured both initially and in subsequent periods at fair value, with changes in fair value recognized in other income (expense), net on the consolidated statements of operations. The fair value of the derivative asset is included in other assets on the consolidated balance sheets. The change in fair value of the derivative asset was as follows:

	Three and Six Months Ended	
	June 30, 2022	
Estimated fair value as of June 1, 2022	\$	1,500
Change in fair value		(700)
Estimated fair value as of June 30, 2022	\$	800
	Three months Ended	
	September 30, 2022	
Estimated fair value - beginning of period	\$	800
Recognition of derivative asset		—
Change in fair value		(300)
Estimated fair value - end of period	\$	500
	Nine Months Ended	
	September 30, 2022	
Estimated fair value - beginning of period	\$	—
Recognition of derivative asset		1,500
Change in fair value		(1,000)
Estimated fair value - end of period	\$	500

The fair value of the derivative asset was immaterial as of June 30, 2023 September 30, 2023 and December 31, 2022.

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Derivative Liabilities

Embedded conversion features derivative liability

On April 11, 2023, the Company completed an exchange (the "Exchange") of \$100.0 million aggregate principal amount of the Company's existing June 2022 Toggle Convertible Notes for the issuance of \$100.0 million aggregate principal amount of 8.00% / 11.00% Series B convertible senior PIK toggle notes (the "April 2023 Toggle Convertible Notes"). The April

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2023 Toggle Convertible Notes were issued pursuant to an indenture dated as of April 11, 2023 (the "April 2023 Toggle Convertible Notes Indenture").

Additionally, in June 2023, the Company completed a private placement of \$11.0 million aggregate principal amount of unsecured 8.00% / 8.00% Series C convertible senior PIK toggle notes (the "June 2023 Toggle Convertible Notes"). The June 2023 Toggle Convertible Notes were issued pursuant to an indenture dated as of June 23, 2023 (the "June 2023 Toggle Convertible Notes Indenture").

The April 2023 Toggle Convertible Notes Indenture and June 2023 Toggle Convertible Notes Indenture, among other things, limits conversion of the April 2023 Toggle Convertible Notes notes in certain instances until the earlier to occur of (x) an increase in the number of authorized shares in an amount sufficient to, among other things, allow for the issuance of common stock underlying the April 2023 Toggle Convertible Notes notes and (y) October 11, 2023, and provides that the Company shall elect to settle conversions of the April 2023 Toggle Convertible Notes notes in cash until such increase in the number of authorized shares has occurred, and the Company obtains the stockholder approval contemplated by Rule 5635 of the Nasdaq listing rules ("Nasdaq Rule").

The conversion features embedded to the April 2023 Toggle Convertible Notes were bifurcated and recognized separately at fair value due to the temporary requirement to settle conversions in cash, in certain instances, until stockholder approval as contemplated by Nasdaq Rule 5635 is obtained to increase the number of authorized shares. Upon the Exchange, the Company recognized \$21.2 million for the embedded conversion features as a derivative liability within accrued expenses and other current liabilities on the consolidated balance sheets. The

During the third quarter of 2023, and commensurate with the approval to increase the number of authorized shares on August 3, 2023, the Company reassessed the conversion features bifurcated from the April 2023 Toggle Convertible Notes and June 2023 Toggle Convertible Notes. As of August 3, 2023, the conversion features met all equity classification criteria, and as a result, the derivative liability was liabilities were remeasured as of June 30, 2023 August 3, 2023, with changes and reclassified from accrued expenses and other current liabilities to additional paid-in capital on the consolidated balance sheets. Changes in its the fair value of the derivative liabilities are recorded in within other income (expense), net on the consolidated statements of operations.

During the three and six nine months ended June 30, 2023 September 30, 2023, the change in fair value of the derivative liability liabilities was as follows:

	Three and Six Months Ended	June 30, 2023
Estimated fair value at April 11, 2023	\$ 21,180	
Change in estimated fair value	8,160	
Estimated fair value at June 30, 2023	<u>29,340</u>	
	Three months Ended	Nine Months Ended
	September 30, 2023	September 30, 2023
Estimated fair value - beginning of period	\$ 29,340	\$ —
Recognition of derivative liability	—	21,180
Change in estimated fair value	212,511	220,671
Reclassification to equity	(241,851)	(241,851)
Estimated fair value - end of period	<u>—</u>	<u>—</u>

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The fair value of the conversion features was/were estimated by applying a with-and-without approach to a binomial lattice model. The following reflects the ranges of inputs and assumptions used:

	As of	
	June 30, 2023	April 11, 2023
Stock price	\$ 1.38	\$ 1.09
Conversion price	\$ 1.46	\$ 1.46
Risk free rate	4.49 %	3.76 %
Equity volatility	60 %	70 %
Expected dividend yield	— %	— %
Credit spread	17.20 %	16.40 %

	For the three months ended September 30, 2023	For the three months ended June 30, 2023
Stock price	\$1.09 - \$3.40	\$1.09 - \$1.38
Conversion price	\$1.46 - \$1.48	\$1.46
Risk free rate	3.76% - 4.58%	3.76% - 4.49%
Equity volatility	47.50% - 60%	60% - 70%
Expected dividend yield	—%	—%
Credit spread	14.9% - 20.1%	16.4% - 17.2%

Put right and price differential derivative liabilities

On September 13, 2021, the Company entered into an Amended Membership Interest Purchase Agreement (the "Amended MIPA") with Wabash Valley Resources ("WVR") and the sellers party thereto (each, a "Seller"), pursuant to which the Company was subject to the first price differential and second price differential (together the "Price Differential").

The Price Differential was a freestanding financial instrument and accounted for as a derivative liability. The derivative liability was remeasured at each reporting period with changes in its fair value recorded in other income (expense),

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net on the consolidated statements of operations. The first price differential was settled in the fourth quarter of 2021. The second price differential was settled in the third quarter of 2022 for \$6.6 million, eliminating the Company's derivative liability balance as of September 30, 2022. During the three and ~~six~~ nine months ended ~~June 30, 2022~~ September 30, 2022, the change in fair value of the derivative liability was as follows:

	Three Months Ended		Six Months Ended	
	June 30, 2022	June 30, 2022	June 30, 2022	June 30, 2022
Estimated fair value - beginning of the period	\$ 3,752	\$ 3,752	\$ 4,189	\$ 4,189
Change in estimated fair value	2,836	2,836	2,399	2,399
Estimated fair value - end of the period	<u>\$ 6,588</u>	<u>\$ 6,588</u>	<u>\$ 6,588</u>	<u>\$ 6,588</u>

The fair value as of June 30, 2022, was based on the settlement amount that was subsequently paid on July 1, 2022.

	Three Months Ended		Nine Months Ended	
	September 30, 2022	September 30, 2022	September 30, 2022	September 30, 2022
Estimated fair value - beginning of the period	\$ 6,588	\$ 6,588	\$ 4,189	\$ 4,189
Change in estimated fair value	—	—	2,399	2,399
Settlement of second price differential	(6,588)	(6,588)	(6,588)	(6,588)
Estimated fair value - end of the period	<u>\$ —</u>	<u>\$ —</u>	<u>\$ —</u>	<u>\$ —</u>

Liability classified awards Classified Awards

During the second quarter and third quarters of 2023, the Company reclassified certain share-based payment awards from equity to liabilities that would require cash settlement upon distribution or exercise. The fair value of these awards ~~is~~ was determined based on the closing price of the Company's stock or a Black-Scholes model as of the measurement date and as of the end of each reporting period. Changes in the fair value of the liability ~~are~~ liabilities were recognized as compensation cost over the requisite service period.

As of August 3, 2023, the share-based payment awards classified as liabilities no longer required cash settlement upon distribution or exercise. The Company reclassified the share-based payment awards into additional paid in capital on the

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Company's consolidated balance sheets at their fair value accrued as compensation cost at the end of each period is equal to the percentage of the requisite service that has been rendered at that date. Changes in the fair value of liability classified awards during the three and nine months ended ~~June 30, 2023~~ September 30, 2023, were immaterial as follows:

	Three Months Ended	Nine Months Ended
--	---------------------------	--------------------------

	September 30, 2023	September 30, 2023
Liability classified awards - beginning of the period	\$ 2,006	\$ —
Reclassification of share-based payment awards to liability	8,395	10,401
Change in fair value	10,591	10,591
Reclassification of share-based payment awards to equity	(20,992)	(20,992)
Liability classified awards - end of the period	<hr/> \$ —	<hr/> \$ —

(c) Revenue Recognition

Truck sales

Truck sales consist of revenue recognized on the sales of the Company's BEV trucks. The sale of a truck is generally recognized as a single performance obligation at the point in time when control is transferred to the customer (dealers). Control is deemed transferred when the product is picked up by the carrier and the customer (dealer) can direct the product's use and obtain substantially all of the remaining benefits from the product. The Company may offer certain after-market upgrades at the request of the dealers. If a contract contains more than one distinct performance obligation, the transaction price is allocated to each performance obligation based on the standalone selling price of each performance obligation. The Company does not offer returns on truck sales. The Company may be required to repurchase dealer inventory in the event a dealer agreement is terminated.

Revenue is recognized based on the transaction price, which is measured as the amount of consideration that the Company expects to receive in exchange for transferring the product pursuant to the terms of the contract with its customer. The transaction price may be adjusted, if applicable, for variable consideration, such as customer rebates and financing costs on floor plan arrangements, which requires the Company to make estimates for the portion of these allowances that have yet to be credited to customers.

Payments for trucks sold are made in accordance with the Company's customary payment terms. The Company has elected an accounting policy whereby the Company does not adjust the promised amount of consideration for the effects of a significant financing component because, at contract inception, the Company expects the period between the time when the Company transfers a promised good or service to the customer and the time when the customer pays for that good or service will be one year or less. Sales tax collected from customers is not considered revenue and is accrued until remitted to the taxing authorities. Shipping and handling activities occur after the customer has obtained control of the product, thus the Company has elected to account for those expenses as fulfillment costs in cost of revenues, rather than an additional promised service.

Services and other

Services and other revenues consist primarily of sales of mobile charging trailers ("MCTs") and other charging products. The sale of MCTs and other charging products, service parts, after-market parts, and hydrogen. Sales are generally recognized as a single performance obligation at the point in time when control is transferred to the customer. Control is deemed transferred when the product is delivered to the customer and the customer can direct the product's use and obtain substantially all of the remaining benefits from the asset. The Company does not offer sales returns on MCTs and other charging products. Payment for products sold are made in accordance with the Company's

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customary payment terms and the Company's contracts do not have significant financing components. The Company has elected to exclude sales taxes from the measurement of the transaction price.

(d) Product Warranties and Recall Campaigns

Warranty Product warranty costs are recognized upon transfer of control of trucks to dealers, and are estimated based on factors including the length of the warranty, product costs, supplier warranties, and product failure rates. Warranty reserves are reviewed and adjusted quarterly to ensure that accruals are adequate to meet expected future warranty obligations. Initial

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warranty data is limited early in the launch of a new product and accordingly, future adjustments to the warranty accrual may be material.

Recall campaign costs are recognized when a product recall liability is probable and related amounts are reasonably estimable. Costs are estimated based on the number of trucks to be repaired and the required repairs including engineering and development, product costs, labor rates, and shipping. Estimating the cost to repair the trucks is highly subjective and requires significant management judgment. Based on information that is currently available, management believes that the accruals are adequate. It is possible that substantial additional charges may be required in future periods based on new information, changes in facts and circumstances, and actions the Company may commit to or be required to undertake.

During the third quarter of 2023, the Company filed a voluntary recall with the National Highway Traffic Safety Administration for 209 of the Company's BEV trucks. The recall was initiated as a result of preliminary results of the Company's battery pack thermal event investigation. The investigation was in response to a thermal event caused by a battery pack defect. The Company is transporting all BEV trucks to the Company's Coolidge manufacturing facility where the BEV trucks will be retrofit with battery packs from another supplier. The Company accrued recall campaign costs of \$61.8 million for the BEV trucks that are expected to be returned to dealers and customers once the recall work is complete. The Company placed a temporary hold on new BEV truck shipments until its BEV truck inventory has been retrofit with alternative battery packs. See Note 12, *Commitments and Contingencies*, for additional information.

The change in warranty liability for the three and **six** nine months ended **June 30, 2023** September 30, 2023 and 2022 is summarized as follows:

		Three Months Ended June 30,		Six Months Ended June 30,		Three Months Ended September 30,		Nine months ended September 30,				
		2023		2022		2023		2022				
		Accrued warranty - beginning of period	Accrued warranty - beginning of period	\$ 9,248	\$ —	\$ 7,788	\$ —	Accrued warranty - beginning of period	\$ 11,057	\$ 2,203	\$ 7,788	\$ —
Warranties issued in period - product warranty								Warranties issued in period - product warranty				
Warranties issued in period - recall campaign								Warranties issued in period - recall campaign	172	2,611	4,245	4,601
Net changes in liability for pre-existing warranties								Net changes in liability for pre-existing warranties	61,848	—	61,848	—
Warranty costs incurred	Warranty costs incurred	(553)	—	(584)	—			Warranty costs incurred	(1,084)	(213)	(1,304)	—
Net changes in liability for pre-existing warranties		(242)	—	(544)	—							
Provision for new warranties		2,604	2,203	4,397	2,203							
Accrued warranty - end of period	Accrued warranty - end of period	\$ 11,057	\$ 2,203	\$ 11,057	\$ 2,203	Accrued warranty - end of period	\$ 70,328	\$ 4,401	\$ 70,328	\$ 4,401		

As of **June 30, 2023** September 30, 2023, warranty accrual of **\$2.0** \$62.0 million was recorded in accrued expenses and other current liabilities and **\$9.0** \$8.4 million in other long-term liabilities on the consolidated balance sheets. As of December 31, 2022, warranty accrual of \$1.5 million was recorded in accrued expenses and other current liabilities and \$6.3 million in other long-term liabilities on the consolidated balance sheets.

(e) Recent Accounting Pronouncements

Recently issued accounting pronouncements not yet adopted

In October 2023, the Financial Accounting Standards Board ("FASB") issued Accounting Standards Update No. 2023-06 to clarify or improve disclosure and presentation requirements of a variety of topics, which will allow users to more easily compare entities subject to the SEC's existing disclosures with those entities that were not previously subject to the requirements, and align the requirements in the FASB accounting standard codification with the SEC's regulations. The Company is currently evaluating the provisions of the amendments and the impact on its future consolidated statements.

3. BUSINESS COMBINATION

Romeo Acquisition

On October 14, 2022, the Company completed the Romeo Acquisition. Under the terms of the acquisition, the Company acquired all of the issued and outstanding shares of common stock, par value 0.0001 per share, of Romeo ("Romeo Common Stock") in exchange for 0.1186 of a share (the "Romeo Exchange Ratio") of the Company's common stock, rounded down to the nearest whole number of shares.

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Total consideration for the acquisition of Romeo is summarized as follows:

	Purchase consideration
Fair value of Nikola common stock issued to Romeo stockholders ⁽¹⁾	\$ 67,535
Settlement of pre-existing relationships in the form of loan forgiveness ⁽²⁾	27,923
Settlement of pre-existing relationships in the form of accounts payable	(18,216)
Fair value of outstanding stock compensation awards attributable to pre-acquisition services ⁽³⁾	1,345
Total purchase consideration	\$ 78,587

(1)Represents the acquisition date fair value of 22.1 million shares of Nikola common stock issued to Romeo stockholders, based on the Romeo Exchange Ratio, at the October 14, 2022 closing price of \$3.06 per share.

(2)The Company entered into an Agreement and Plan of Merger and Reorganization dated July 30, 2022 (the "Merger Agreement") with Romeo. Concurrently with the execution of the Merger Agreement, Romeo entered into a loan agreement (the "Loan Agreement") with the Company as the lender. The Loan Agreement provided for a facility in an aggregate principal amount of up to \$30.0 million (subject to certain incremental increases of up to \$20.0 million), which were available for drawing subject to certain terms and conditions set forth in the Loan Agreement. Interest was payable on borrowings under the

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facility at the secured overnight financing rate ("SOFR") plus 8.00%. Upon closing, the loan and related accrued interest were forgiven and considered part of the purchase price. As of acquisition close, Romeo had drawn \$12.5 million on the loan and accrued \$0.1 million in interest.

Additionally, as part of the Loan Agreement entered into with Romeo, the Company agreed to a short-term battery price increase. Through the acquisition close, the Company recorded \$15.3 million in prepaid expenses and other current assets on the consolidated balance sheets related to the incremental pack price increase, which was considered part of the purchase consideration upon close.

(3)Represents the portion of the fair value of the replacement awards related to services provided prior to the acquisition. The remaining portion of the fair value is associated with future service and will be recognized as expense over the future service period.

The acquisition was accounted for as a business combination using the acquisition method of accounting in accordance with ASC 805, Business Combinations ("ASC 805"). The purchase price was allocated to the assets acquired and liabilities assumed based on the estimated fair values at the date of acquisition. The acquisition resulted in goodwill due to the purchase consideration exceeding the estimated fair value of the identifiable net assets acquired by \$1.5 million.

During the second quarter of 2023, the Company transferred ownership of all of Romeo's right, title and interest in and to all of its tangible and intangible assets to an Assignee, who is designated Assignee to act as the assignee for the benefit of creditors of Romeo. Refer to Note 10, *Deconsolidation of Subsidiary*, for additional information.

4. BALANCE SHEET COMPONENTS

Inventory

Inventory consisted of the following at June 30, 2023 September 30, 2023 and December 31, 2022, respectively:

		As of			As of	
		June 30, 2023	December 31, 2022		September 30, 2023	December 31, 2022
Raw materials	Raw materials	\$ 21,777	\$ 52,442	Raw materials	\$ 18,707	\$ 52,442
Work in process	Work in process	25,562	9,646	Work in process	22,120	9,646
Finished goods	Finished goods	33,860	47,677	Finished goods	10,437	47,677
Service parts	Service parts	5,436	2,105	Service parts	5,694	2,105
Total inventory	Total inventory	<u>\$ 86,635</u>	<u>\$ 111,870</u>	Total inventory	<u>\$ 56,958</u>	<u>\$ 111,870</u>

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Inventory cost is computed using standard cost, which approximates actual cost on a first-in, first-out basis. Inventories are stated at the lower of cost or net realizable value. Inventories are written down for any excess or obsolescence and when net realizable value, which is based upon estimated selling prices, is in excess of carrying value. Once inventory is written-down, a new, lower cost basis for that inventory is established and subsequent changes in facts and circumstances do not result in the restoration of or increase in that newly established cost basis.

During the third quarter of 2023, the Company reclassified all BEV truck finished goods inventory to work in process to be retrofit with alternative battery packs related to the

Company's voluntary recall. Additionally, during the third quarter of 2023, the Company wrote down BEV inventory related to the existing battery packs, cells and other BEV components which were deemed excess or obsolete due to the voluntary recall.

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Prepaid Expenses and Other Current Assets

Prepaid expenses and other current assets consisted of the following at June 30, 2023 September 30, 2023 and December 31, 2022, respectively:

	As of		As of	
	June 30, 2023	December 31, 2022	September 30, 2023	December 31, 2022
Contingent stock consideration receivable	\$ 28,428	\$ —		
Inventory deposits		Inventory deposits	\$ 14,810	\$ 415
Prepaid expenses		Prepaid expenses	7,941	5,333
Non-trade receivables		Non-trade receivables	5,827	6,064
Prepaid insurance premiums		Prepaid insurance premiums	3,409	3,611
Headquarters sale agreement receivable		Headquarters sale agreement receivable	2,600	5,487
Deposits	Deposits	Deposits	2,052	3,917
Prepaid expenses	9,248	5,748		
Headquarters sale agreement receivable	6,543	5,487		
Prepaid insurance premiums	4,496	3,611		
Non-trade receivables	3,707	6,064		
Prepaid software	Prepaid software	Prepaid software	1,879	1,015
Deferred implementation costs	Deferred implementation costs	Deferred implementation costs	460	2,101
Total prepaid expenses and other current assets	Total prepaid expenses and other current assets	Total prepaid expenses and other current assets	\$ 38,978	\$ 27,943

Deferred implementation costs

Deferred implementation costs are amortized on a straight-line basis over the estimated useful life of the related software. The Company recorded an immaterial amount of amortization expense on the consolidated statements of operations for the three and six nine months ended June 30, 2023 September 30, 2023, related to deferred implementation costs.

During the second quarter of 2022, the Company re-assessed the estimated useful life of its existing enterprise resource planning system as a result of ongoing re-implementation. The Company recorded \$1.2 million and \$1.3 million \$2.4 million of amortization expense on the consolidated statements of operations for the three and six nine months ended June 30, 2022 September 30, 2022, respectively, related to deferred implementation costs.

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Property, Plant and Equipment, Net

Property, plant and equipment, net consisted of the following at June 30, 2023 September 30, 2023 and December 31, 2022:

	As of	
	June 30, 2023	December 31, 2022
Construction-in-progress	\$ 248,956	\$ 209,187
Buildings	136,567	127,797

Equipment	47,115	35,257
Tooling	29,449	17,693
Land	24,762	24,762
Demo vehicles	16,007	15,215
Software	8,495	8,568
Other	3,571	3,501
Leasehold improvements	3,046	2,953
Finance lease assets	2,193	2,193
Furniture and fixtures	1,494	1,492
Property, plant and equipment, gross	521,655	448,618
Less: accumulated depreciation and amortization	(38,612)	(30,833)
Total property, plant and equipment, net	\$ 483,043	\$ 417,785

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	As of	
	September 30, 2023	December 31, 2022
Construction-in-progress	\$ 217,899	\$ 209,187
Buildings	162,795	127,797
Equipment	49,535	35,257
Tooling	38,833	17,693
Finance lease assets	14,887	2,193
Software	8,617	8,568
Land	7,957	24,762
Other	3,683	3,501
Leasehold improvements	3,082	2,953
Furniture and fixtures	1,483	1,492
Demo vehicles	—	15,215
Property, plant and equipment, gross	508,771	448,618
Less: accumulated depreciation and amortization	(38,920)	(30,833)
Total property, plant and equipment, net	\$ 469,851	\$ 417,785

Construction-in-progress on the Company's consolidated balance sheets as of **June 30, 2023** **September 30, 2023** relates primarily to the expansion of the Company's manufacturing plant in Coolidge, Arizona, **and** development of hydrogen **infrastructure**, and expansion of the Company's headquarters and R&D facility in Phoenix, Arizona. **infrastructure**.

Depreciation expense for the three months ended **June 30, 2023** **September 30, 2023** and 2022 was **\$4.5 million** **\$15.1 million** and **\$3.5 million** **\$3.9 million**, respectively. Depreciation expense for the **six** **nine** months ended **June 30, 2023** **September 30, 2023** and 2022 was **\$8.8 million** **\$23.9 million** and **\$6.6** **\$10.5 million**, respectively.

In July 2023, the Company executed a membership interest and asset purchase agreement (the "Purchase Agreement") with FFI Phoenix Hub Holdings, LLC, a wholly-owned subsidiary of Fortescue Future Industries ("FFI"). Pursuant to the terms of the Purchase Agreement, FFI Phoenix Hub Holdings, LLC, acquired 100% of the interests in Phoenix Hydrogen Hub, LLC, the Company's wholly owned subsidiary holding the assets related to the Phoenix hydrogen hub project, including land and construction-in-progress. The Company received net proceeds of \$20.7 million during the third quarter of 2023 pursuant to the terms of the Purchase Agreement. The Company's proceeds are net of a \$3.7 million holdback, related to which the Company recorded \$1.2 million in prepaid expenses and other current assets, and \$2.5 million in other assets on the consolidated balance sheets.

During the third quarter of 2023, the Company reassessed the useful lives of its BEV demo vehicles, and subsequently retired all demo vehicles.

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Accrued Expenses and Other Current Liabilities

Accrued expenses and other current liabilities consisted of the following at **June 30, 2023** **September 30, 2023** and December 31, 2022:

As of	As of
-------	-------

		June 30, 2023	December 31, 2022		September 30, 2023		December 31, 2022
SEC settlement	SEC settlement	\$ 87,000	\$ 90,000	SEC settlement	\$ 85,500	\$ 90,000	
Derivative liability		29,340	—				
Warranty liability, current				Warranty liability, current	61,953	1,484	
Accrued purchase of intangible asset	Accrued purchase of intangible asset	13,608	32,126	Accrued purchase of intangible asset	13,216	32,126	
Other accrued expenses		9,983	2,152				
Inventory received not yet invoiced				Inventory received not yet invoiced	12,696	18,167	
Accrued outsourced engineering services	Accrued outsourced engineering services	9,954	8,056	Accrued outsourced engineering services	7,845	8,056	
Accrued legal expenses	Accrued legal expenses	5,123	2,041	Accrued legal expenses	6,618	2,041	
Inventory received not yet invoiced		5,086	18,167				
Accrued payroll and payroll related expenses				Accrued payroll and payroll related expenses	5,797	8,298	
Other accrued expenses				Other accrued expenses	4,264	2,152	
Accrued purchases of property, plant and equipment	Accrued purchases of property, plant and equipment	5,071	3,587	Accrued purchases of property, plant and equipment	3,718	3,587	
Accrued payroll and payroll related expenses		4,548	8,298				
Operating lease liabilities, current	Operating lease liabilities, current	2,220	1,979	Operating lease liabilities, current	2,434	1,979	
Warranty liability, current		2,024	1,484				
Accrued Equity Distribution Agreement fees				Accrued Equity Distribution Agreement fees	1,114	1,681	
Supply agreement revision commitment	Supply agreement revision commitment	—	10,000	Supply agreement revision commitment	—	10,000	
Accrued Equity Distribution Agreement fees		—	1,681				
Total accrued expenses and other current liabilities	Total accrued expenses and other current liabilities	\$ 173,957	\$ 179,571	Total accrued expenses and other current liabilities	\$ 205,155	\$ 179,571	

5. INVESTMENTS IN AFFILIATES

Investments in unconsolidated affiliates accounted for under the equity method consisted of the following:

	Ownership as of June 30, 2023	As of	
		June 30, 2023	December 31, 2022
Nikola Iveco Europe GmbH	— %	\$ —	\$ 4,142
Wabash Valley Resources LLC	20 %	57,289	57,674
Nikola - TA HRS 1, LLC	50 %	1,000	1,000
	\$ —	\$ 58,289	\$ 62,816

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	Ownership as of September 30, 2023	As of	
		September 30, 2023	December 31, 2022
Nikola Iveco Europe GmbH	— %	\$ —	\$ 4,142
Wabash Valley Resources LLC	20 %	\$ 57,193	\$ 57,674
Nikola - TA HRS 1, LLC	50 %	\$ 1,000	\$ 1,000
		\$ 58,193	\$ 62,816

Equity in net loss of affiliates on the consolidated statements of operations for the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023** and 2022, were as follows:

	Equity in net loss of affiliates:	Three Months Ended June 30,				Six Months Ended June 30,				Three Months Ended September 30,		Nine Months Ended September 30,		
		2023	2022	2023	2022	2023	2022	2023	2022	2023	2022	2023	2022	
Nikola Iveco Europe GmbH	Nikola Iveco Europe GmbH	\$ (7,146)	\$ (1,201)	\$ (15,556)	\$ (4,039)					Nikola Iveco Europe GmbH	\$ —	\$ (1,959)	\$ (15,556)	\$ (5,998)
Wabash Valley Resources LLC	Wabash Valley Resources LLC	(471)	(69)	(469)	(51)					Wabash Valley Resources LLC	(262)	(25)	(731)	(76)
Total equity in net loss of affiliates	Total equity in net loss of affiliates	\$ (7,617)	\$ (1,270)	\$ (16,025)	\$ (4,090)					Total equity in net loss of affiliates	\$ (262)	\$ (1,984)	\$ (16,287)	\$ (6,074)

Nikola Iveco Europe GmbH

In April 2020, the Company and Iveco S.P.A. ("Iveco") became parties to a series of agreements which established a joint venture in Europe, Nikola Iveco Europe GmbH. The operations of the joint venture are located in Ulm, Germany, and consist of manufacturing the FCEV and BEV Class 8 trucks for the European market. The agreements provided for a 50/50 ownership of the joint venture and a 50/50 allocation of the joint venture's production volumes and profits between the

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Company and Iveco. Nikola Iveco Europe GmbH was considered a variable interest entity ("VIE") due to insufficient equity to finance its activities without additional subordinated financial support. The Company was not considered the primary beneficiary as it did not have the power to direct the activities that most significantly impact the economic performance based on the terms of the agreements. Accordingly, the VIE was accounted for under the equity method.

On June 29, 2023 (the "Divestiture Closing"), the Company and Iveco executed the European Joint Venture Transaction Agreement (the "Transaction Agreement") whereby the Company sold its 50% equity interest in Nikola Iveco Europe GmbH to Iveco for \$35.0 million. In conjunction with the Transaction Agreement, the Company issued an intellectual property license agreement (the "License Agreement"), which grants Iveco and Nikola Iveco Europe GmbH a non-exclusive, perpetual, irrevocable, fully sublicensable, transferable, and fully assignable license ("Licensed Software") to software and controls technology related to the BEV and FCEV. According to the terms of the Transaction Agreement, the Company **may also** **was eligible** to receive 20.6 million shares of its own common stock from Iveco, contingent on successful due diligence ("Software Due Diligence") performed by Iveco and its consultants on the Licensed Software delivered to Iveco on the Divestiture Closing pursuant to the License Agreement. The Software Due Diligence **is** **was** evaluated based on mutually agreed criteria between Iveco and the Company and will be performed starting on the June 29, 2023, and ending on August 4, 2023. Company.

On the Divestiture Closing, the Company recognized a gain equal to the difference between the consideration received and its basis in the Nikola Iveco Europe GmbH investment, consisting of a liability balance of \$11.4 million for investment in affiliates, and cumulative currency translation losses of \$1.5 million. The delivery of the Licensed Software on the Divestiture Closing was determined to represent a right to use the Licensed Software and the performance obligation was satisfied upon the delivery of the Licensed Software on Divestiture Closing. The Company recognized gains related to the derecognition of its basis in Nikola Iveco Europe GmbH and delivery of the Licensed Software in gain on divestiture of affiliate on the consolidated statements of operations. During the **three** and **six** **nine** months ended **June 30, 2023** **September 30, 2023**, the Company recognized a gain of \$70.8 million in gain on divestiture of affiliates consisting of the following:

	Three and Six Nine Months Ended
	June September 30, 2023
Cash consideration received	\$ 35,000
Contingent stock consideration receivable	25,956
Derecognition of investment in affiliate	11,428
Derecognition of cumulative currency translation losses	(1,535)
Gain on divestiture of affiliate	\$ 70,849

Contingent stock consideration receivable

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received

The contingent stock consideration was accounted for as variable consideration and included in total consideration as of Divestiture Closing, as it was not probable that a significant reversal of such consideration will occur upon resolution of the contingency. On August 3, 2023, the Software Due Diligence was deemed successful and Iveco transferred to the Company 20.6 million shares of Nikola common stock, which were immediately retired. The Company recognized the fair value of the common stock upon receipt in accumulated deficit on the consolidated balance sheets. The fair value of the contingent stock consideration was determined based on the closing price of the Company's common stock price, as of the Divestiture Closing. As of June 30, 2023, the fair value of the contingent stock consideration was \$28.4 million, and during the three and six months ended June 30, 2023, the Company recognized a change with changes in fair value of \$2.5 million recognized in other income (expense), net on the consolidated statements of operations.

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During the three and nine months ended September 30, 2023, the change in fair value of the contingent stock consideration was as follows:

	Three Months Ended	Nine Months Ended
	September 30, 2023	September 30, 2023
Fair value - beginning of the period	\$ 28,428	\$ —
Contingent stock consideration recognized on Divestiture Closing	—	25,956
Change in fair value	41,509	43,981
Delivery of shares for stock consideration	(69,937)	(69,937)
Fair value - end of the period	\$ —	\$ —

Wabash Valley Resources LLC

On June 22, 2021, the Company entered into a Membership Interest Purchase Agreement (the "MIPA") with WVR and the Sellers, pursuant to which, the Company purchased a 20% equity interest in WVR in exchange for \$25.0 million in cash and 1,682,367 shares of the Company's common stock. WVR is developing a clean hydrogen project in West Terre Haute, Indiana, including a hydrogen production facility. The common stock consideration was calculated based on the Company's 30-day average closing stock price, or \$14.86 per share, and the Company issued 1,682,367 shares of its common stock.

The Company's interest in WVR is accounted for under the equity method and is included in investment in affiliates on the Company's consolidated balance sheets. Included in the initial carrying value was a basis difference of \$55.5 million due to the difference between the cost of the investment and the Company's proportionate share of WVR's net assets. The basis difference is primarily comprised of property, plant and equipment and intangible assets.

As of June 30, 2023 September 30, 2023, the Company's maximum exposure to loss was \$57.6 \$57.7 million, which represents the book value of the Company's equity interest and loans to WVR for \$0.3 \$0.5 million.

Nikola - TA HRS 1, LLC

In March 2022, the Company and Travel Centers of America, Inc. ("TA") entered into a series of agreements which established a joint venture, Nikola - TA HRS 1, LLC. The operations expected to be performed by the joint venture consist of the development, operation and maintenance of a hydrogen fueling station. Operations have not commenced as of June 30, 2023 September 30, 2023.

The agreements provide for 50/50 ownership of the joint venture. Both parties are entitled to appoint an equal number of board members to the management committee of the joint venture. Pursuant to the terms of the agreements, the Company contributed \$1.0 million to Nikola - TA HRS 1, LLC in 2022.

Nikola - TA HRS 1, LLC is considered a VIE due to insufficient equity to finance its activities without additional subordinated financial support. The Company is not considered the primary beneficiary as it does not have the power to direct the activities that most significantly impact the economic performance based on the terms of the agreements. Accordingly, the VIE is accounted for under the equity method.

The Company does not guarantee debt for, or have other financial support obligations to the entity and its maximum exposure to loss in connection with its continuing involvement with the entity is limited to the carrying value of the investment.

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6. INTANGIBLE ASSETS, NET

The gross carrying amount and accumulated amortization of separately identifiable intangible assets are as follows:

	As of June 30, 2023		
	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount
Licenses:			
S-WAY Product and Platform license	\$ 50,000	\$ 8,929	\$ 41,071
FCPM license	47,181	—	47,181
Other intangibles	1,650	338	1,312
Total intangible assets	\$ 98,831	\$ 9,267	\$ 89,564

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	As of September 30, 2023		
	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount
Licenses:			
S-WAY Product and Platform license	\$ 50,000	\$ 10,714	\$ 39,286
FCPM license	47,181	—	47,181
Other intangibles	1,650	405	1,245
Total intangible assets	\$ 98,831	\$ 11,119	\$ 87,712

	As of December 31, 2022		
	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount
Licenses:			
S-WAY Product and Platform license	\$ 50,000	\$ 5,357	\$ 44,643
FCPM license	47,181	—	47,181
Other intangibles	800	151	649
Total intangible assets	\$ 97,981	\$ 5,508	\$ 92,473

Amortization expense related to intangible assets for the three and **six** nine months ended **June 30, 2023** **September 30, 2023** was **\$1.8** **\$1.9** million and **\$3.8** **\$5.6** million, respectively. Amortization expense related to intangible assets for the three and **six** nine months ended **June 30, 2022** **September 30, 2022** was **\$1.8** **\$1.7** million and **\$1.9** **\$3.6** million, respectively.

In 2021, the Company acquired a license for fuel cell power modules ("FCPMs") for use in the production of FCEVs. The Company **will** expects to amortize the license beginning at the start of **in-house** FCPM production, for FCEVs **in** expected to commence in the **second** **first** half of **2023** **2024**. As of **June 30, 2023** **September 30, 2023**, the Company has not started amortizing the license.

7. DEBT AND FINANCE LEASE LIABILITIES

A summary of debt and finance lease liabilities as of **June 30, 2023** **September 30, 2023** and December 31, 2022, were as follows:

	As of		Current:	As of	
	June 30, 2023	December 31, 2022		September 30, 2023	December 31, 2022
Current:	Current:				
Promissory notes	\$ 9,459	\$ 9,309			

Senior Convertible Notes			Senior Convertible Notes	\$	32,381	\$	50,000
Insurance premium financing	Insurance premium financing	3,528	1,999	Insurance premium financing	3,673	1,999	
Finance lease liabilities	Finance lease liabilities	382	367	Finance lease liabilities	2,370	367	
Promissory notes				Promissory notes	686	9,309	
Financing obligations				Financing obligations	67	—	
Financing obligations		48	—				
5% Senior Convertible Notes		—	50,000				
Debt and finance lease liabilities, current	Debt and finance lease liabilities, current	\$ 13,417	\$ 61,675	Debt and finance lease liabilities, current	\$ 39,177	\$ 61,675	

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Non-current:	Non-current:	As of		As of	
		June 30, 2023		September 30, 2023	
		June 30, 2023	December 31, 2022	September 30, 2023	December 31, 2022
Toggle Convertible Notes	Toggle Convertible Notes	\$ 212,876	\$ 199,786	\$ 119,291	\$ 199,786
Financing obligations	Financing obligations	101,002	50,359	101,233	50,359
Promissory notes	Promissory notes	33,958	39,165	2,501	39,165
Finance lease liabilities	Finance lease liabilities	556	818	9,346	818
Long-term debt and finance lease liabilities, net of current portion	Long-term debt and finance lease liabilities, net of current portion	\$ 348,392	\$ 290,128	\$ 232,371	\$ 290,128

The fair values of the following debt obligations are estimated using level 2 fair value inputs, including stock price and risk-free rates. The following table presents the carrying value and estimated fair values:

		As of June 30, 2023		As of September 30, 2023	
		Carrying Value		Fair Value	
		June 2022 Toggle Convertible Notes			
June 2022 Toggle Convertible Notes	June 2022 Toggle Convertible Notes	\$ 107,013	\$ 78,370	\$ 111,003	\$ 93,788
April 2023 Toggle Convertible Notes		94,846	126,260		
June 2023 Toggle Convertible Notes	June 2023 Toggle Convertible Notes	11,017	11,570	8,288	13,220
Collateralized Note		40,050	39,043		
Second Collateralized Note	Second Collateralized Note	3,367	3,280	3,187	3,086

Insurance Premium financing	Insurance Premium financing	3,528	3,526	Insurance Premium financing	September 2023	2,372	2,370
September 2023	Insurance Premium financing			September 2023	Insurance Premium financing		
						1,224	1,220

Toggle Convertible Notes

In June 2022, the Company completed a private placement of \$200.0 million aggregate principal amount of the Company's June 2022 Toggle Convertible Notes, which will mature on May 31, 2026. The June 2022 Toggle Convertible Notes were issued pursuant to an indenture, dated as of June 1, 2022 (the "June 2022 Toggle Convertible Notes Indenture").

In April 2023, the Company completed an exchange of \$100.0 million aggregate principal amount of the Company's June 2022 Toggle Convertible Notes for the issuance of \$100.0 million aggregate principal amount of April 2023 Toggle Convertible Notes, which will mature on May 31, 2026. The April 2023 Toggle Convertible Notes were issued pursuant to the April 2023 Toggle Convertible Notes Indenture. In conjunction with the issuance of the April 2023 Toggle Convertible Notes, the Company executed the first supplemental indenture to the June 2022 Toggle Convertible Notes Indenture dated as of April 3, 2023 (the "First Supplemental Indenture to June 2022 Notes"), and the second supplemental indenture to the June 2022 Toggle Convertible Notes Indenture dated as of April 10, 2023 (the "Second Supplemental Indenture to June 2022 Notes"), which First Supplemental Indenture to June 2022 Notes, among other things, amended the conversion provisions of the June 2022 Toggle Convertible Notes Indenture to limit conversions of the June 2022 Toggle Convertible Notes in certain instances until the earlier to occur of (x) an increase in the number of authorized shares in an amount sufficient to, among other things, allow for the issuance of common stock underlying the June 2022 Toggle Convertible Notes and (y) October 11, 2023, and provide that the Company shall elect to settle conversions of the June 2022 Toggle Convertible Notes in cash prior to such increase in the number of authorized shares.

Additionally, in June 2023, the Company completed a private placement of \$11.0 million aggregate principal amount of unsecured 8.00% / 8.00% Series C convertible senior PIK toggle notes (the "June 2023 Toggle Convertible Notes" and together with the June 2022 Toggle Convertible Notes and the April 2023 Toggle Convertible Notes, the "Toggle Convertible Notes"), which will mature on May 31, 2026. The June 2023 Toggle Convertible Notes were issued pursuant to an indenture dated as of June 23, 2023 (the "June 2023 Toggle Convertible Notes Indenture" and, together with the June 2022 Toggle Convertible Notes Indenture and the April 2023 Toggle Convertible Notes Indenture, the "Toggle Convertible Notes Indentures"). The June 2023 Toggle Convertible Notes were issued in consideration as a consent fee to the holders for execution of the third supplemental indenture to the June 2022 Toggle Convertible Notes Indenture dated as of June 23, 2023 (the "Third Supplemental Indenture to June 2022 Notes"), and the first supplemental indenture to the April 2023 Toggle Convertible Notes Indenture dated as of June 23, 2023 (the "First Supplemental Indenture to April 2023 Notes"), which, among other things,

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released Romeo as a guarantor of the June 2022 Toggle Convertible Notes and the April 2023 Toggle Convertible Notes, respectively.

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Below is a summary of certain terms of the Toggle Convertible Notes:

Interest Payments

The Company can elect to make any interest payment on the Toggle Convertible Notes in cash ("Cash Interest"), through the issuance of additional Toggle Convertible Notes in the form of the Toggle Convertible Notes with respect to which such interest is due ("PIK Interest"), or any combination thereof. Interest on the Toggle Convertible Notes is payable semi-annually in arrears. The interest rates and payment dates for each of the Toggle Convertible Notes is summarized below:

	June 2022 Toggle Convertible Notes	April 2023 Toggle Convertible Notes	June 2023 Toggle Convertible Notes
PIK interest rate (per annum)	11.00%	11.00%	8.00%
Cash interest rate (per annum)	8.00%	8.00%	8.00%
Semi-annual interest payable dates	May 31 and November 30 of each year	May 31 and November 30 of each year	June 30 and December 31 of each year
First interest payment date	November 30, 2022	May 31, 2023	December 31, 2023

The April 2023 Toggle Convertible Note and June 2023 Toggle Convertible Note shall bear interest at the applicable Cash Interest rate or PIK Interest rate from November 30, 2022 and June 23, 2023, respectively.

Conversions

Based on the applicable conversion rates, the Toggle Convertible Notes are convertible into cash, shares of the Company's common stock or a combination thereof, at the Company's election; however, election. However, conversions of the Toggle Convertible Notes are limited in certain instances until the earlier to occur of (x) an increase in the

number of authorized shares in an amount sufficient to, among other things, allow for the issuance of common stock underlying such Toggle Convertible Notes and (y) October 11, 2023, and the Company shall elect to settle conversions of the Toggle Convertible Notes in cash until such increase in the number of authorized shares has occurred and in the case of conversions of the April 2023 Toggle Convertible Notes, we obtain the Company obtains the stockholder approval contemplated by Nasdaq Rule 5635. The Company amended its Second Amended and Restated Certificate of Incorporation to increase the number of authorized shares of common stock from 800,000,000 to 1,600,000,000, following approval by the stockholders at the Company's annual meeting of stockholders on August 3, 2023.

The initial conversion rates are 114.3602 and 686.8132 shares per \$1,000 principal amount of the June 2022 Toggle Convertible Notes and April 2023 Toggle Convertible Notes, respectively, subject to customary anti-dilution adjustments in certain circumstances, which represent initial conversion prices of approximately \$8.74 and \$1.46 per share, respectively.

With respect to the June 2023 Toggle Convertible Notes, the initial conversion rate shall be an amount equal to (a) 674.4258 divided by (b) a quotient, (i) the numerator of which is the sum of (x) the initial principal amount of the June 2023 Toggle Convertible Notes outstanding immediately prior to such conversion and (y) the aggregate amount capitalized related to PIK Interest issuances in respect of interest that came due on the June 2023 Toggle Convertible Notes and (ii) the denominator of which is the initial principal amount of the June 2023 Toggle Convertible Notes.

The Toggle Convertible Notes Indentures provide that prior to February 28, 2026, the Toggle Convertible Notes will be convertible at the option of the holders only upon the occurrence of specified events and during certain periods, and will be convertible on or after February 28, 2026, at any time until the close of business on the second scheduled trading day immediately preceding the maturity date of the Toggle Convertible Notes.

Holders of the Toggle Convertible Notes will have the right to convert all or a portion of their Toggle Convertible Notes prior to the close of business on the business day immediately preceding February 28, 2026 only under the following circumstances: (i) during any fiscal quarter commencing after the fiscal quarter ending on September 30, 2022 for the June 2022 Toggle Convertible Notes, during any fiscal quarter commencing after the fiscal quarter ending on June 30, 2023 for the April 2023 Toggle Convertible Notes, during any fiscal quarter commencing after the fiscal quarter ending on September 30, 2023 for the June 2023 Toggle Convertible Notes (and only during such fiscal quarter), if the last reported sale price of the Common Stock for at least 20 trading days (whether or not consecutive) during a period of 30 consecutive trading days ending on, and

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including, the last trading day of the immediately preceding fiscal quarter is greater than or equal to 130% of the conversion

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price for the Toggle Convertible Notes on each applicable trading day; (ii) during the five business day period after any ten consecutive trading day period in which the trading price per \$1,000 principal amount of the Toggle Convertible Notes for each trading day of that ten consecutive trading day period was less than 98% of the product of the last reported sale price of the Common Stock and the conversion rate of the Toggle Convertible Notes on each such trading day; (iii) if the Company calls such Toggle Convertible Notes for redemption, at any time prior to the close of business on the second business day immediately preceding the redemption date; or (iv) upon the occurrence of specified corporate events.

Redemption

Except with respect to the June 2023 Toggle Convertible Notes as described in the immediately succeeding paragraph, the Company may not redeem the Toggle Convertible Notes prior to June 1, 2025. The Company may redeem the Toggle Convertible Notes in whole or in part, at its option, on or after such date and prior to the 26th scheduled trading day immediately preceding the maturity date, for a cash purchase price equal to the aggregate principal amount of any Toggle Convertible Notes to be redeemed plus accrued and unpaid interest.

The June 2023 Toggle Convertible Notes provide for an additional optional redemption period from the initial issuance of such Toggle Convertible Notes through the first interest payment date of December 31, 2023, in whole and not in part for a cash purchase price equal to the aggregate principal amount of the June 2023 Toggle Convertible Notes.

In addition, following certain corporate events that occur prior to the maturity date or following issuance by the Company of a notice of redemption, in certain circumstances, the Company will increase the conversion rate for a holder who elects to convert its Toggle Convertible Notes (other than the June 2023 Toggle Convertible Notes) in connection with such a corporate event or who elects to convert any such Toggle Convertible Notes called for redemption during the related redemption period. Additionally, in the event of a fundamental change or a change in control transaction, holders of the Toggle Convertible Notes will have the right to require the Company to repurchase all or a portion of their Toggle Convertible Notes at a price equal to 100% of the capitalized principal amount of such Toggle Convertible Notes, in the case of a fundamental change, or 130% of the capitalized principal amount of such Toggle Convertible Notes, in the case of change in control transactions, in each case plus any accrued and unpaid interest to, but excluding, the repurchase date.

The Toggle Convertible Notes Indentures include restrictive covenants that, subject to specified exceptions, limit the ability of the Company and its subsidiaries to incur secured debt in excess of \$500.0 million, incur other subsidiary guarantees, and sell equity interests of any subsidiary that guarantees the Toggle Convertible Notes. In addition, the Toggle Convertible Notes Indentures include customary terms and covenants, including certain events of default after which the holders may accelerate the maturity of the Toggle Convertible Notes issued thereunder and cause them to become due and payable immediately upon such acceleration.

In conjunction with the issuance of the June 2022 Toggle Convertible Notes, the Company executed the Put Premium which was determined to be an embedded derivative that met the criteria for bifurcation from the host. The total proceeds received were first allocated to the fair value of the bifurcated derivative asset, and the remaining proceeds allocated to the host resulting in an adjustment to the initial purchasers' debt discount.

The net proceeds from the sale of the June 2022 Toggle Convertible Notes were \$183.2 million, net of initial purchasers' discounts and debt issuance costs. Unamortized debt discount and issuance costs were reported as a direct deduction from the face amount of the June 2022 Toggle Convertible Notes.

During the second quarter of 2023, the exchange of \$100.0 million of June 2022 Toggle Convertible Notes for the issuance of \$100.0 million of April 2023 Toggle Convertible Notes was determined to represent a substantial change in terms and extinguishment accounting was applied. The Company recognized a loss on debt extinguishment of \$20.4 million for the three and six nine months ended **June 30, 2023** **September 30, 2023**. As part of the assessment of the exchange, the Company bifurcated the conversion features on the April 2023 Toggle Convertible Notes and recognized a derivative liability of \$21.2 million as of the exchange date, resulting in an adjustment to the debt discount.

Additionally, during the second quarter of 2023, the execution of the Third Supplemental Indenture to June 2022 Notes and First Supplemental Indenture to April 2023 Notes were deemed modifications to the Toggle Convertible Notes outstanding under the June 2022 Toggle Convertible Notes Indenture and April 2023 Toggle Convertible Notes Indenture, respectively, as the amended terms did not substantially change the terms of the respective notes. The consideration paid to the holders in the

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form of the issuance of the June 2023 Toggle Convertible Notes was recognized as an issuance cost upon modification and is

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amortized as an adjustment of interest expense over the remaining terms of the June 2022 Toggle Convertible Notes and April 2023 Toggle Convertible Notes.

On August 4, 2023, the holders of the April 2023 Toggle Convertible Notes exercised their conversion right for all the outstanding principal amount. The Company elected to settle the conversion with the issuance of 72,458,789 shares of common stock. The remaining unamortized discount was recognized in interest expense, net on the consolidated statements of operations due to the reclassification of the conversion feature to equity.

The net carrying amounts of the debt component of the Toggle Convertible Notes as of **June 30, 2023** **September 30, 2023** were as follows:

		June 2022 Toggle Convertible Notes	April 2023 Toggle Convertible Notes	June 2023 Toggle Convertible Notes		June 2022 Toggle Convertible Notes	June 2023 Toggle Convertible Notes
Principal amount	Principal amount	\$ 117,041	\$ 105,500	\$ 11,000	Principal amount	\$ 117,041	\$ 11,000
Accrued PIK interest	Accrued PIK interest	1,109	999	17	Accrued PIK interest	4,327	237
Unamortized discount	Unamortized discount	(2,691)	(6,296)	—	Unamortized discount	(2,502)	(2,949)
Unamortized issuance costs	Unamortized issuance costs	(8,446)	(5,357)	—	Unamortized issuance costs	(7,863)	—
Net carrying amount	Net carrying amount	<u>\$ 107,013</u>	<u>\$ 94,846</u>	<u>\$ 11,017</u>	Net carrying amount	<u>\$ 111,003</u>	<u>\$ 8,288</u>

The net carrying amounts of the debt component of the Toggle Convertible Notes as of December 31, 2022 were as follows:

	June 2022 Toggle Convertible Notes
Principal amount	\$ 210,939
Accrued PIK interest	1,998
Unamortized discount	(6,443)
Unamortized issuance costs	(6,708)
Net carrying amount	<u>\$ 199,786</u>

As of **June 30, 2023** **September 30, 2023**, the effective interest rates on the June 2022 Toggle Convertible Notes **April 2023 Toggle Convertible Notes** and June 2023 Toggle Convertible Notes were 13.90% and 14.38% and 8.00%, respectively. Amortization of the debt discount and issuance costs is reported as a component of interest expense and is computed using the straight-line method over the term of the applicable Toggle Convertible Notes, which approximates the effective interest method.

The following table presents the Company's interest expense related to the June 2022 Toggle Convertible Notes:

	Three Months Ended June 30,				Three Months Ended September 30,		Nine Months Ended September 30,	
	2023	2022	2023	2022	2023	2022	2023	2022

Contractual interest expense	Contractual interest expense	\$ 3,109	\$ 1,784	\$ 6,159	\$ 1,784	Contractual interest expense	\$ 3,219	\$ 5,500	\$ 12,464	\$ 7,284
Amortization of debt discount and issuance costs	Amortization of debt discount and issuance costs	803	307	1,735	307	Amortization of debt discount and issuance costs	785	922	2,520	1,228
Total interest expense	Total interest expense	\$ 3,912	\$ 2,091	\$ 7,894	\$ 2,091	Total interest expense	\$ 4,004	\$ 6,422	\$ 14,984	\$ 8,512

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The following table presents the Company's interest expense related to the April 2023 Toggle Convertible Notes:

	Contractual interest expense	Three Months Ended		Six Months Ended		Contractual interest expense	Three Months Ended		Nine Months Ended	
		June 30, 2023	June 30, 2023	June 30, 2023	September 30, 2023		September 30, 2023	September 30, 2023	September 30, 2023	September 30, 2023
Contractual interest expense	Contractual interest expense	\$ 2,802		\$ 5,552		Contractual interest expense	\$ 1,096		\$ 3,562	
Amortization of debt discount and issuance costs	Amortization of debt discount and issuance costs	712		712		Amortization of debt discount and issuance costs	41,530		42,242	
Total interest expense	Total interest expense	\$ 3,514		\$ 6,264		Total interest expense	\$ 42,626		\$ 45,804	

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Interest For the three and nine months ended September 30, 2023, the Company recognized an immaterial amount of interest expense related to on the June 2023 Toggle Convertible Notes was immaterial for the three and six months ended June 30, 2023, Notes.

5% Senior Convertible Notes

First Purchase Agreement Notes

On December 30, 2022, the Company entered into a securities purchase agreement (the "Purchase" "First Purchase Agreement") with the investors named therein for the sale of up to \$125.0 million in initial principal amount of unsecured senior convertible notes (the "5% Senior Convertible Notes" "First Purchase Agreement Notes"), in a registered direct offering. The First Purchase Agreement 5% Senior Convertible Notes are convertible into shares of the Company's common stock, subject to certain conditions and limitations. The Company consummated an initial closing for the sale of \$50.0 million in aggregate principal amount of 5% Senior Convertible First Purchase Agreement Notes on December 30, 2022 (the "Series A Notes").

Subsequent to the initial closing, the Company entered into amended securities purchase agreements (the "Amended Purchase Agreements") pursuant to which the Company consummated additional closings on March 17, 2023 for the sale of \$25.0 million in aggregate principal amount of 5% Senior Convertible First Purchase Agreement Notes (the "Series B-1 Notes"), on May 10, 2023 for the sale of \$15.0 million in aggregate principal amount of 5% Senior Convertible First Purchase Agreement Notes (the "Series B-2 Notes"), and on May 25, 2023 for the sale of \$12.1 million in aggregate principal amount of 5% Senior Convertible First Purchase Agreement Notes (the "Series B-3 Notes").

The purchase price for the 5% Senior Convertible First Purchase Agreement Notes is \$1,000 per \$1,000 principal amount. Subject to certain conditions being met or waived, at the option of the Company, one or more additional closings for up to the remaining principal amount of 5% Senior Convertible First Purchase Agreement Notes may occur. The aggregate principal amount of 5% Senior Convertible Notes that may be offered in the additional closings may not be more than \$22.9 million and the Company's option to sell additional 5% Senior Convertible Notes will be exercisable until the first anniversary of the date of the Purchase Agreement (or such earlier date as the Company shall determine, in its sole discretion, by written notice to the investors).

Each 5% Senior Convertible First Purchase Agreement Note will accrue interest at a rate of 5% per annum, payable in arrears on the first calendar day of each calendar quarter, beginning April 1, 2023 for the Series A Notes, June 1, 2023 for the Series B-1 Notes and July 1, 2023 for the Series B-2 and Series B-3 Notes. Interest will be payable in cash or shares of the Company's common stock or in a combination of cash and shares of common stock, at the Company's option. The interest rate will increase to an annual rate of 12.5% per annum upon the occurrence and during the continuance of an event of default under the term of the 5% Senior Convertible First Purchase Agreement Notes. Each 5% Senior Convertible First Purchase Agreement Note issued pursuant to the First Purchase Agreement and Amended Purchase Agreement Agreements will have a maturity date of one year from issuance, which may be extended at the option of the noteholders in certain instances. Upon any conversion, redemption or other repayment of a 5% Senior Convertible First Purchase Agreement Note, a "make-whole" amount equal to the amount of additional interest that would accrue under such 5% Senior Convertible First Purchase

Agreement Note at the interest rate then in effect assuming that the outstanding principal of such 5% Senior Convertible First Purchase Agreement Notes remained outstanding through and including the maturity date of such 5% Senior Convertible First Purchase Agreement Note.

At any time on or after January 9, 2023, all or any portion of the principal amount of each 5% Senior Convertible First Purchase Agreement Note, plus accrued and unpaid interest, any make-whole amount and any late charges thereon (the "Conversion Amount"), is convertible at any time, in whole or in part, at the noteholder's option, into shares of the Company's common stock at a conversion price per share (the "Conversion Price") equal to the lower of (i) the applicable "reference price", subject to certain adjustments (the "Reference Price"), (ii) the greater of (x) the applicable "floor price" (the "Floor Price") and (y) the volume weighted average price ("VWAP") of the Common Stock as of the conversion date, and (iii) the greater of (x) the Floor Price, and as elected by the converting noteholder, (y) either (X) depending on the delivery time of the applicable conversion notice, (1) the VWAP as of the applicable conversion date or (2) the VWAP immediately prior to the applicable conversion date and (Y) 95% of the average VWAP for the three trading days commencing on, and including, the applicable conversion date,

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subject to adjustment in accordance with the terms of the Notes. The Reference Price and Floor Price applicable to each issuance of 5% Senior Convertible First Purchase Agreement Notes is summarized below:

	Reference Price	Floor Price
Series A Notes	\$ 5.975	\$ 0.478
Series B-1 Notes	\$ 4.050	\$ 0.478
Series B-2 Notes	\$ 2.140	\$ 0.478
Series B-3 Notes	\$ 1.952	\$ 0.478

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At any time during an Event of Default Redemption Right Period (as defined below), a noteholder may alternatively elect to convert all or any portion of the 5% Senior Convertible First Purchase Agreement Notes at an alternate conversion rate (the "Alternate Conversion Rate") equal to the quotient of (i) 115% of the Conversion Amount divided by (ii) the Conversion Price.

Upon a change of control, a noteholder may, subject to certain exceptions, require the Company to redeem all, or any portion, of the 5% Senior Convertible First Purchase Agreement Notes in cash at a price equal to 115% of the greatest of: (i) the Conversion Amount, (ii) the product of (x) the Conversion Amount and (y) the quotient of (I) the greatest closing sale price of the common stock during the period beginning on the date immediately preceding the earlier to occur of (1) the consummation of a change of control and (2) the public announcement of such change of control, and ending on the date the noteholder notifies the Company of its exercise of its right to redeem pursuant to the change of control divided by (II) the Conversion Price, and (iii) the product of (x) the Conversion Amount and (y) the quotient of (I) the aggregate consideration per share of common stock to be paid to the holders of the Common Stock upon consummation of such change of control divided by (II) the Conversion Price.

At any time an "Equity Conditions Failure" (as defined in the 5% Senior Convertible First Purchase Agreement Notes) exists at the time of consummation of certain "Subsequent Placements" (as defined in the Purchase Agreement), the noteholders have the right, subject to certain exceptions, to require that the Company redeem all, or any portion, of the Conversion Amount of the Notes not in excess of the gross proceeds of such Subsequent Placement at a redemption price of 100% of the Conversion Amount to be redeemed. If the noteholder is participating in such Subsequent Placement, the noteholder may require the Company to apply all, or any part, of any amounts that would otherwise be payable to the noteholder in such redemption, on a dollar-for-dollar basis, against the purchase price of the securities to be purchased by the noteholder in such Subsequent Placement.

A noteholder will not have the right to convert any portion of the 5% Senior Convertible First Purchase Agreement Notes, to the extent that, after giving effect to such conversion, the noteholder (together with certain of its affiliates and other related parties) would beneficially own in excess of 4.99% of the shares of common stock outstanding immediately after giving effect to such conversion (the "Maximum Percentage"). The noteholder may from time to time increase the Maximum Percentage to 9.99%, provided that any such increase will not be effective until the 61st day after delivery of a notice to the Company of such increase.

The 5% Senior Convertible First Purchase Agreement Notes provide for certain Events of Default, including certain types of bankruptcy or insolvency events of default involving the Company after which the 5% Senior Convertible First Purchase Agreement Notes become automatically due and payable. At any time after the earlier of (x) a noteholder's receipt of a required notice of an event of default, and (y) the noteholder becoming aware of an event of default, and ending on the twentieth trading day after the later of (I) the date such event of default is cured, and (II) the investor's receipt of an event of default notice from the Company (such period, the "Event of Default Redemption Rights Period"), the noteholder may require the Company to redeem, subject to certain exceptions, all or any portion of its Notes at a price equal to 115% of the greater of (i) the Conversion Amount and (ii) the product of the Alternate Conversion Rate and the greatest closing sale price of the common stock on any trading day during the period commencing on the date immediately preceding such Event of Default and ending on the trading day immediately prior to the date the Company makes the entire redemption payment.

The Company will be subject to certain customary affirmative and negative covenants regarding the rank of the 5% Senior Convertible Notes, the incurrence of certain indebtedness, the repayment of certain indebtedness, transactions with affiliates, and restrictions on certain issuance of securities, among other customary matters.

The following table summarizes conversions of the 5% Senior Convertible Notes during the six months ended June 30, 2023:

	Series A Notes	Series B-1 Notes	Series B-2 Notes	Series B-3 Notes
Shares of common stock issued for conversions	21,785,618	21,127,720	21,758,268	22,639,159
Principal balance converted	\$ 50,000	\$ 25,000	\$ 15,000	\$ 12,075
Make-whole interest converted	\$ 2,500	\$ 1,250	\$ 750	\$ 604
Average conversion price	\$ 2.41	\$ 1.24	\$ 0.72	\$ 0.56

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The following table summarizes conversions of the 5% Senior Convertible First Purchase Agreement Notes during the three nine months ended June 30, 2023 September 30, 2023:

	Series A Notes	Series B-1 Notes	Series B-2 Notes	Series B-3 Notes		Series A Notes	Series B-1 Notes	Series B-2 Notes	Series B-3 Notes	
Shares of common stock issued for conversions	Shares of common stock issued for conversions	—	10,555,032	21,758,268	22,639,159	Shares of common stock issued for conversions	21,785,618	21,127,720	21,758,268	22,639,159
Principal balance converted	Principal balance converted	\$ —	\$ 10,714	\$ 15,000	\$ 12,075	Principal balance converted	\$ 50,000	\$ 25,000	\$ 15,000	\$ 12,075
Make-whole interest converted	Make-whole interest converted	\$ —	\$ 536	\$ 750	\$ 604	Make-whole interest converted	\$ 2,500	\$ 1,250	\$ 750	\$ 604
Average conversion price	Average conversion price	\$ —	\$ 1.07	\$ 0.72	\$ 0.56	Average conversion price	\$ 2.41	\$ 1.24	\$ 0.72	\$ 0.56

The Company elected to account for the 5% Senior Convertible Notes First Purchase Agreement pursuant to the fair value option under ASC 825. ASC 825-10-15-4 provides for the "fair value option" ("FVO") election, to the extent not otherwise prohibited by ASC 825-10-15-5, to be afforded to financial instruments, wherein the financial instrument is initially measured at its issue-date estimated fair value and subsequently remeasured at estimated fair value on a recurring basis at each reporting period date. The Company believes that the fair value option better reflects the underlying economics of the 5% Senior Convertible First Purchase Agreement Notes. As of June 30, 2023 and December 31, 2022, the Company recognized zero and \$50.0 million respectively, on the consolidated balance sheets for the fair value of 5% Senior Convertible First Purchase Agreement Notes outstanding. The First Purchase Agreement was terminated in the third quarter of 2023.

Second Purchase Agreement Notes

On August 21, 2023, the Company entered into a securities purchase agreement (the "Second Purchase Agreement") with the investors named therein for the sale of up to \$325.0 million in initial principal amount of senior convertible notes (the "Second Purchase Agreement Notes"), in a registered direct offering. Pursuant to Nasdaq Rule 5635, the Company is limited to the issuance of an aggregate of 171,179,577 shares under the terms of the Second Purchase Agreement. The Second Purchase Agreement Notes (together with the First Purchase Agreement Notes, the "Senior Convertible Notes") are convertible into shares of the Company's common stock, subject to certain conditions and limitations. The Company consummated an initial closing for the sale of \$125.0 million in aggregate principal amount of Second Purchase Agreement Notes on August 21, 2023 (the "Series A-1 Notes").

Subsequent to the initial closing, the Company entered into a supplemental indenture pursuant to which the Company consummated an additional closing on September 22, 2023 for the sale of \$40.0 million in aggregate principal amount of Second Purchase Agreement Notes (the "Series A-2 Notes").

The purchase price for the Second Purchase Agreement Notes is \$1,000 per \$1,000 principal amount. Subject to certain conditions being met or waived, at the option of the Company, one or more additional closings for up to the remaining principal amount of Second Purchase Agreement Notes may occur. The aggregate principal amount of Second Purchase Agreement Notes that may be offered in the additional closings may not be more than \$160.0 million and the Company's option to sell additional Second Purchase Agreement Notes will be exercisable until the 18 month anniversary of the date of the Second Purchase Agreement.

Each Second Purchase Agreement Note will accrue interest at a rate of 5% per annum, payable in arrears on the first calendar day of each calendar quarter, beginning January 1, 2024 for the Series A-1 Notes and for the Series A-2 Notes. Interest will be payable in cash or shares of the Company's common stock or in a combination of cash and shares of common stock, at the Company's option. The interest rate will increase to an annual rate of 12.5% per annum upon the occurrence and during the continuance of an event of default under the term of the Second Purchase Agreement Notes. Each Second Purchase Agreement Note issued pursuant to the Second Purchase Agreement will have a maturity date of one year from issuance, which may be extended at the option of the noteholders in certain instances. Upon any conversion, redemption or other repayment of a Second Purchase Agreement Note, a "make-whole" amount equal to the amount of additional interest that would accrue under such Second Purchase Agreement Note at the interest rate then in effect assuming that the outstanding principal of such Second Purchase Agreement Notes remained outstanding through and including the maturity date of such Second Purchase Agreement Note.

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At any time on or after August 21, 2023, the Conversion Amount is convertible at any time, at the Conversion Price. The Reference Price and Floor Price applicable to each issuance of Second Purchase Agreement Notes is summarized below:

	Reference Price	Floor Price
Series A-1 Notes	\$ 2.940	\$ 0.380
Series A-2 Notes	\$ 2.940	\$ 0.380

The following table summarizes conversions of the Second Purchase Agreement Notes during the three and nine months ended September 30, 2023:

	Series A-1 Notes	Series A-2 Notes
Shares of common stock issued for conversions	128,380,608	5,721,018
Principal balance converted	\$ 125,000	\$ 7,619
Make-whole interest converted	\$ 6,250	\$ 381
Average conversion price	\$ 1.02	\$ 1.40

The Company elected to account for the Second Purchase Agreement Notes pursuant to the fair value option under ASC 825. As of September 30, 2023, the Company recognized \$32.4 million on the consolidated balance sheets for the fair value of Second Purchase Agreement Notes outstanding.

Financing Obligations

On May 10, 2022 (the "Sale Date"), the Company entered into a sale agreement (the "Sale Agreement"), pursuant to which the Company sold the land and property related to the Company's headquarters in Phoenix, Arizona for a purchase price of \$52.5 million. As of the Sale Date, \$13.1 million was withheld from the proceeds received related to portions of the headquarters undergoing construction. The Company receives the remaining proceeds throughout the completion of construction pursuant to the terms of the Sale Agreement. Concurrent with the sale, the Company entered into a lease agreement (the "Lease Agreement"), whereby the Company leased back the land and property related to the headquarters for an initial term of 20 years with four extension options for 7 years each. As of the Sale Date, the Company considered one extension option reasonably certain of being exercised.

The buyer is not considered to have obtained control of the headquarters because the lease is classified as a finance lease. Accordingly, the sale of the headquarters is not recognized and the property and land continue to be recognized on the Company's consolidated balance sheets. As of the Sale Date, the Company recorded \$38.3 million as a financing obligation on the Company's consolidated balance sheets representing proceeds received net of debt issuance costs of \$1.1 million. Rent payments under the terms of the Lease Agreement will be allocated between interest expense and principal repayments using the effective interest method. Additionally, debt issuance costs will be amortized to interest expense over the lease term.

After the Sale Date and through **June 30, 2023** **September 30, 2023**, the Company recognized an additional \$13.1 million for financing obligations on the Company's consolidated balance sheets for construction completed after the Sale Date. As of **June 30, 2023** **September 30, 2023**, the Company has recognized a HQ Sale Agreement receivable of \$6.5 \$2.6 million for funds not yet received for construction completed in prepaid expenses and other current assets. Additionally, for the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023**, the Company recognized \$0.9 million and \$1.8 \$2.7 million, respectively, of interest expense related to interest on the financing obligation and amortization of debt issuance costs. For the three and **six** **nine** months ended **June 30, 2022** **September 30, 2022**, the Company recognized \$0.5 \$0.9 million and \$1.4 million, respectively, of interest expense related to interest on the financing obligation and amortization of debt issuance costs.

On June 29, 2023 (the "Land Sale Date"), the Company entered into a sale agreement (the "Land Sale Agreement"), pursuant to which the Company sold the land in Coolidge, Arizona on which the Company's manufacturing facility is located for a purchase price of \$50.4 million. Concurrent with the sale, the Company entered into a lease agreement (the "Land Lease Agreement"), whereby the Company leased back the land for an initial term of 99 years. The Land Lease Agreement grants the Company an option to repurchase the land upon the fiftieth (50th) anniversary of the Land Sale Date for a price equal to the

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greater of the fair market value, or 300% of the purchase price. As of the Land Sale Date, the Company considered the purchase option reasonably certain of being exercised.

The buyer is not considered to have obtained control of the land because the lease is classified as a finance lease. Accordingly, the sale of the land in Coolidge, Arizona is not recognized and the land continues to be recognized on the

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Company's consolidated balance sheets. As of the Land Sale Date, the Company recorded \$49.4 million as a financing obligation on the Company's consolidated balance sheets representing proceeds received net of debt issuance costs of \$1.0 million. Rent payments under the terms of the Land Lease Agreement will be allocated between interest expense

and principal repayments using the effective interest method. Additionally, debt issuance costs will be amortized to interest expense over the lease term.

For the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023**, the Company recognized \$1.3 million and \$1.3 million, respectively, of interest expense related to interest on the financing obligation and amortization of debt issuance costs was immaterial costs.

Collateralized Promissory Notes

On June 7, 2022, the Company executed a promissory note and a master security agreement (the "Master Security Agreement") for \$50.0 million at a stated interest rate of 4.26% (the "Collateralized Note"). The Collateralized Note **is** was fully collateralized by certain personal property assets as fully described in the Master Security Agreement. The carrying value of personal property assets pledged as collateral was \$31.3 million as of June 30, 2023. Additionally, in connection with the Collateralized Note the Company executed a pledge agreement pursuant to which the Company pledged \$50.0 million in cash as additional collateral in order to obtain a more favorable interest rate. The amount pledged is recorded in restricted cash on the consolidated balance sheets as of June 30, 2023. The Collateralized Note carries carried a 60 month term and is was payable in 60 equal consecutive monthly installments due in arrears.

For the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023**, the Company recognized \$0.4 \$0.2 million and \$0.9 \$1.1 million of interest expense, respectively, on the Collateralized Note. For the three and **six** **nine** months ended **June 30, 2022** **September 30, 2022**, the Company recognized \$0.1 \$0.5 million and \$0.7 million, respectively, of interest expense on the Collateralized Note. The Company repaid \$39.3 million during the third quarter of 2023, representing the outstanding principal balance of the Collateralized Note.

On August 4, 2022, the Company executed a promissory note and a security agreement for \$4.0 million at an implied interest rate of 7.00% (the "Second Collateralized Note"). The Second Collateralized Note is fully collateralized by certain personal property assets as fully described in the security agreement. The carrying value of personal property assets pledged as collateral was \$9.4 million as of June 30, 2023. The Second Collateralized Note carries a 60 month term and is payable in 60 equal monthly installments due in arrears.

For the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023** and 2022, interest expense related to the Second Collateralized Note was immaterial.

As of June 30, 2023, the Company had \$119.9 million of property, plant and equipment including buildings, land, leasehold improvements, machinery and equipment, construction in progress, software and tooling and \$6.9 million of operating lease assets encumbered related to obligations of the Company.

Insurance Premium Financing

The Company executed an insurance premium financing agreement pursuant to which the Company financed certain annual insurance premiums for \$6.6 million, primarily consisting of premiums for directors' and officers' insurance. The insurance premium payable incurred interest at 2.95%, and matured on March 27, 2023.

During the second quarter and third quarters of 2023, the Company executed an additional insurance premium financing agreement agreements pursuant to which the Company financed certain annual insurance premiums for \$3.9 million and \$1.2 million, respectively, primarily consisting of premiums for directors' and officers' insurance. The insurance premium payable payables each incurred interest at 6.64%, and is due in monthly installments maturing on March 27, 2024.

For the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023** and 2022, the Company recognized an immaterial amount of interest expense on the insurance premium financing was immaterial agreements.

Letters of Credit

During the third quarter of 2022, the Company executed a \$0.6 million letter of credit to secure a customs bond through August 31, 2023. During the third quarter of 2023, the Company executed a \$1.2 million letter of credit to secure a customs bond through September 14, 2024. As of **June 30, 2023** **September 30, 2023**, no amounts have been drawn on the letter of credit.

During the second quarter of 2022, and in conjunction with the execution of the Lease Agreement, the Company executed an irrevocable standby letter of credit for \$12.5 million to collateralize the Company's lease obligation. The Lease Agreement was subsequently amended, increasing the amount of the letter of

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credit to \$13.1 million. The letter of credit is subject to annual increases commensurate with base rent increases pursuant to the Lease Agreement. The letter of credit will

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expire upon the expiration of the Lease Agreement, but may be subject to reduction or early termination upon the satisfaction of certain conditions as described in the Lease Agreement.

During the fourth quarter of 2021, the Company executed an irrevocable standby letter of credit for \$25.0 million through December 31, 2024 in connection with the execution of a product supply agreement with a vendor. The supply agreement was subsequently amended, reducing the amount of the letter of credit to \$15.0 million. As of **June 30, 2023** **September 30, 2023**, no amounts have been drawn on the letter of credit.

8. CAPITAL STRUCTURE

Shares Authorized

As of **June 30, 2023** **September 30, 2023**, the Company had authorized a total of **950,000,000** **1,750,000,000** shares consisting of **800,000,000** **1,600,000,000** shares designated as common stock and 150,000,000 shares designated as preferred stock.

Warrants

As of **June 30, 2023** **September 30, 2023** and December 31, 2022, the Company had 841,183 and 1,137,850 private warrants outstanding, respectively. The Company assumed the private warrants previously issued by VectoIQ Acquisition Corp. ("VectoIQ") and Romeo through the Business Combination and Romeo Acquisition, respectively, and each private warrant entitles the registered holder to purchase one share of common stock at a price of \$11.50 or \$96.96 per share, **respectively**, subject to adjustment.

The exercise price and number of common shares issuable upon exercise of the private warrants may be adjusted in certain circumstances including in the event of a stock dividend, or recapitalization, reorganization, merger or consolidation. However, the private warrants will not be adjusted for the issuance of common stock at a price below their exercise price.

For the three months ended **June 30, 2023** **September 30, 2023** and 2022, the Company recorded an immaterial gain **zero**, and **\$3.3** **\$0.6** million gain, respectively, for revaluation of warrant liability on the consolidated statement of operations. For the **six** **nine** months ended **June 30, 2023** **September 30, 2023** and 2022, the Company recorded gains of \$0.3 million and **\$2.9** **\$3.5** million, respectively, for revaluation of warrant liability on the consolidated statement of operations. As of **June 30, 2023** **September 30, 2023** and December 31, 2022, the Company had \$0.1 million and \$0.4 million, respectively, for warrant liability related to the private warrants outstanding on the consolidated balance sheets.

Stock Purchase Agreements

First Purchase Agreement with Tumim Stone Capital LLC

On June 11, 2021, the Company entered into a common stock purchase agreement (the "First Tumim Purchase Agreement") and a registration rights agreement (the "Registration Rights Agreement") with Tumim Stone Capital LLC ("Tumim"), pursuant to which Tumim committed to purchase up to \$300.0 million in shares of the Company's common stock, subject to certain limitations and conditions set forth in the First Tumim Purchase Agreement. The Company shall not issue or sell any shares of common stock under the First Tumim Purchase Agreement which, when aggregated with all other shares of common stock beneficially owned by Tumim, would result in beneficial ownership of more than 4.99% of the Company's outstanding shares of common stock.

Under the terms of the First Tumim Purchase Agreement, the Company has the right, but not the obligation, to sell to Tumim, shares of common stock over the period commencing on the date of the First Tumim Purchase Agreement (the "Tumim Closing Date") and ending on the first day of the month following the 36-month anniversary of the Tumim Closing Date. The purchase price will be calculated as 97% of the volume weighted average prices of the Company's common stock during normal trading hours for three consecutive trading days commencing on the purchase notice date.

Concurrent with the signing of the First Tumim Purchase Agreement, the Company issued 155,703 shares of its common stock to Tumim as a commitment fee ("Commitment Shares"). The total fair value of the shares issued for the commitment fee of \$2.6 million was recorded in selling, general, and administrative expense on the Company's consolidated statements of operations.

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During the **six** **nine** months ended **June** **September 30, 2023**, the Company sold 3,420,990 shares of common stock, for proceeds of \$8.4 million, and terminated the First Tumim Purchase Agreement during the first quarter of 2023. During the **three** and **six**

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nine months ended **June 30, 2022** **September 30, 2022**, the Company sold **13,604,600** and **17,248,244** shares of common stock under the First Tumim Purchase Agreement for proceeds of **\$96.3** million and **\$123.7** million **respectively**.

Second Purchase Agreement with Tumim

On September 24, 2021, the Company entered into a second common stock purchase agreement (the "Second Tumim Purchase Agreement") and a registration rights agreement with Tumim, pursuant to which Tumim committed to purchase up to \$300.0 million in shares of the Company's common stock, subject to certain limitations and conditions set forth in the Second Tumim Purchase Agreement. The Company will not issue or sell any shares of common stock under the Second Tumim Purchase Agreement which, when aggregated with all other shares of common stock beneficially owned by Tumim, would result in beneficial ownership of more than 4.99% of the Company's outstanding shares of common stock.

Under the terms of the Second Tumim Purchase Agreement, the Company has the right, but not the obligation, to sell to Tumim, shares of common stock over the period commencing on the date of the Second Tumim Purchase Agreement (the "Second Tumim Closing Date") and ending on the first day of the month following the 36-month anniversary of the Second Tumim Closing Date, provided that certain conditions have been met. These conditions include effectiveness of a registration statement covering the resale of shares of common stock that have been and may be issued under the Second Tumim Purchase Agreement and termination of the First Tumim Purchase Agreement. The registration statement covering the offer and sale of up to 29,042,827 shares of common stock, including the commitment shares, to Tumim was declared effective on November 29, 2021. The purchase price will be calculated as 97% of the volume weighted average prices of the Company's common stock during normal trading hours for three consecutive trading days commencing on the purchase notice date.

Concurrent with the signing of the Second Tumim Purchase Agreement, the Company issued 252,040 shares of its common stock to Tumim as a commitment fee. The total fair value of the shares issued for the commitment fee of \$2.9 million was recorded in selling, general, and administrative expense on the Company's consolidated statement of

operations.

During the three and six nine months ended June September 30, 2023, the Company sold 3,289,301 and 28,790,787 shares of common stock, for proceeds of \$2.9 million and \$59.2 million, respectively, to Tumim under the Second Tumim Purchase Agreement. As of Agreement June 30, 2023, and terminated the Second Tumim Purchase Agreement had no registered shares available for issuance and a remaining commitment during the third quarter of \$240.8 million, subject to an increase in the authorized common stock. 2023.

Equity Distribution Agreement

In August 2022, the Company entered into an equity distribution agreement (the "Equity Distribution Agreement") with Citi as sales agent, pursuant to which the Company can issue and sell shares of its common stock with an aggregate maximum offering price of \$400.0 million under. In August 2023, the Equity Company amended and restated the equity distribution agreement (as amended and restated, the "Equity Distribution Agreement") with Citi as a sales agent, pursuant to which the Company increased the aggregate maximum offering price by \$200.0 million, resulting in an aggregate offering price of up to \$600.0 million.

The Company pays Citi a fixed commission rate of 2.5% of gross offering proceeds of shares sold under the Equity Distribution Agreement. During the three and six nine months ended June 30, 2023 September 30, 2023, the Company sold 22,007,305 27,662,880 and 39,027,563 66,690,443 shares, respectively, of common stock under the Equity Distribution Agreement at an average price per share of \$1.44 \$1.97 and \$1.64 \$1.78, respectively, for gross proceeds of \$31.6 \$54.5 million and \$64.1 \$118.6 million, and net proceeds of approximately \$30.8 \$53.1 million and \$62.5 \$115.6 million, after \$0.8 \$1.4 million and \$1.6 \$3.0 million in commissions to the sales agent. During the three and nine months ended September 30, 2022, the Company sold 19,009,227 shares of common stock under the Equity Distribution Agreement at an average price per share of \$5.29 for gross proceeds of \$100.5 million and net proceeds of approximately \$98.0 million, after \$2.5 million in commissions to the sales agent. Commissions incurred in connection with the Equity Distribution Agreement are reflected as a reduction of additional paid-in capital on the Company's consolidated balance sheets. As of June September 30, 2023 and December 31, 2022, zero \$1.1 million and \$1.7 million, respectively, in commissions were recognized in accrued expenses and other current liabilities on the Company's consolidated balance sheets.

Public Offering

The Company sold 29,910,715 shares of common stock in an underwritten public offering (the "Public Offering") at an offering price of \$1.12 per share. The Public Offering closed on April 4, 2023, and the Company received net proceeds of \$32.2 million after underwriters underwriter's discounts and offering costs.

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Direct Offering

The Company entered into a stock purchase agreement with an investor (the "Investor") pursuant to which the investor agreed to purchase up to \$100.0 million of shares of the Company's common stock in a registered direct offering (the "Direct Offering"), with the actual amount of shares of common stock purchased in the Direct Offering reduced to the extent of the total number of shares issued pursuant to the Public Offering. The Direct Offering closed on April 11, 2023, and the Company sold

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59,374,999 shares of common stock at the Public Offering price of \$1.12 per share to the Investor for net proceeds of \$63.2 million, after deducting placement agent fees and offering expenses.

9. STOCK BASED COMPENSATION EXPENSE

2017 and 2020 Stock Plans

The 2017 Stock Option Plan (the "2017 Plan") provides for the grant of incentive and nonqualified options to purchase common stock to officers, employees, directors, and consultants. Options were granted at a price not less than the fair market value on the date of grant and generally became exercisable between one and four years after the date of grant. Options generally expire ten years from the date of grant. Outstanding awards under the 2017 Plan continue to be subject to the terms and conditions of the 2017 Plan.

On June 2, 2020, the stockholders approved the Nikola Corporation 2020 Stock Incentive Plan (the "2020 Plan") and the Nikola Corporation 2020 Employee Stock Purchase Plan (the "2020 ESPP"). The 2020 Plan provides for the grant of incentive and nonqualified stock options, restricted stock units ("RSUs"), restricted share awards, stock appreciation awards, and cash-based awards to employees, outside directors, and consultants of the Company. The 2020 Plan and the 2020 ESPP became effective immediately upon the closing of the Business Combination. No offerings have been authorized to date by the Company's board of directors under the ESPP.

Stock Options

The Company utilizes the Black-Scholes option pricing model for estimating the fair value of options granted. Options vest in accordance with the terms set forth in the grant letter. Time-based options generally vest ratably over a period of approximately 36 months. Changes in stock options are as follows:

		Options	Weighted Average Exercise Price Per share	Weighted Average Remaining Contractual Term (Years)		Options	Weighted Average Exercise Price Per share	Weighted Average Remaining Contractual Term (Years)
Outstanding at December 31, 2022	Outstanding at December 31, 2022	22,470,585	\$ 1.31	5.33	Outstanding at December 31, 2022	22,470,585	\$ 1.31	5.33
Granted	Granted	—	—		Granted	—	—	
Exercised	Exercised	756,372	1.06		Exercised	6,723,629	1.06	
Cancelled	Cancelled	162,786	1.31		Cancelled	588,508	2.24	
Outstanding at June 30, 2023	<u>21,551,427</u>	\$ 1.32		3.68				
Vested and exercisable as of June 30, 2023	<u>21,551,427</u>	\$ 1.32		3.68				
Outstanding at September 30, 2023					Outstanding at September 30, 2023	15,158,448		3.86
Vested and exercisable as of September 30, 2023					Vested and exercisable as of September 30, 2023	<u>15,158,448</u>	\$ 1.39	3.86

Restricted Stock Units

The fair value of RSUs is based on the closing price of the Company's common stock on the grant date. The time-based RSUs generally vest in increments over a three-year period or, in the case of executive officers, cliff-vest following the third anniversary from the date of grant. The RSUs to directors have a vesting cliff of one year after the grant date.

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Changes in RSUs are as follows:

	Number of RSUs
Balance at December 31, 2022	19,574,800
Granted	10,228,956
Released	7,772,641
Cancelled	4,202,956
Balance at <u>June 30, 2023</u>	<u>17,828,159</u>
September 30, 2023	14,101,793

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Market Based RSUs

Through the first quarter of 2023, the Company's market based RSUs contained a stock price index as a benchmark for vesting. Through the second quarter of 2022, these awards were issued with three milestones that vest depending upon a consecutive 20-trading day stock price target of the Company's common stock. The Company's stock price target was targets ranged from \$25 to \$55 per share.

During the third quarter of 2022, the market based RSUs subject to the \$40 and \$55 stock price milestones were cancelled and the Company expensed \$55.8 million related to the cancelled awards representing the remaining unamortized expense as of the cancellation date.

During the second quarter of 2023, the market based RSUs subject to the \$25 stock price milestone were cancelled and the Company expensed \$6.8 million related to the cancelled awards representing the remaining unamortized expense as of the cancellation date.

On April 24, 2023, the Company granted 2,900,000 performance-based RSUs to the Company's executive officers, which entitle them to receive a specified number of shares of the Company's common stock upon vesting. Additionally, during the third quarter of 2023, the Company granted 1,500,000 performance-based RSUs in connection with the appointment of new executive officers.

The number of shares earned could range between 0% and 200% of the target award depending upon the Company's performance at the conclusion of the three-year performance period, ending December 31, 2025. The performance condition of the awards is based on total shareholder return ("TSR") of the Company's common stock relative to a broad group of green energy companies. The TSR performance condition is deemed a market condition. The fair value of the TSR awards on the grant date was determined using a Monte Carlo simulation model, which utilizes significant assumptions including stock volatility and risk free rates, and does not change throughout the vesting period. The grant date fair value of the TSR awards was determined to be \$4.0 million and is recognized over the vesting period. The following represents the significant assumptions used to determine the grant date fair value for the TSR awards:

	April		June 30, 2023
	During the three months ended September 30, 2023	24, 2023	
Stock price	\$1.40 - \$3.40	\$0.82	0.82
Term (years)	2.30 - 2.40	2.70	
Risk-free interest rate	4.8% - 5.0%	3.9	% 3.9%
Expected volatility	116% - 127%	99.0	% 99.0%
Expected dividend yield	-%	—	%

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Changes in market based RSUs are as follows:

	Number of Market Based RSUs
Balance at December 31, 2022	2,071,058
Granted	2,900,000
Released	—
Cancelled	2,071,058
Balance at June 30, 2023 September 30, 2023	2,900,000

Stock Compensation Expense

The following table presents the impact of stock-based compensation expense on the consolidated statements of operations for the three and **six** **nine** months ended **June 30, 2023** **September 30, 2023** and 2022:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2023	2022	2023	2022
	\$	\$	\$	\$
Cost of revenues	\$ 668	\$ —	\$ 1,399	\$ —
Research and development	6,574	9,300	15,660	18,007
Selling, general, and administrative	18,467	45,541	33,198	90,362
Total stock-based compensation expense	<u>\$ 25,709</u>	<u>\$ 54,841</u>	<u>\$ 50,257</u>	<u>\$ 108,369</u>

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	Three Months Ended September 30,		Nine Months Ended September 30,	
	2023	2022	2023	2022
	\$	\$	\$	\$
Cost of revenues	\$ 414	\$ —	\$ 1,813	\$ —
Research and development	3,383	10,105	19,043	28,112
Selling, general, and administrative	14,862	92,740	48,060	183,102
Total stock-based compensation expense	<u>\$ 18,659</u>	<u>\$ 102,845</u>	<u>\$ 68,916</u>	<u>\$ 211,214</u>

As of **June 30, 2023** **September 30, 2023**, total unrecognized compensation expense was as follows:

	Unrecognized Compensation Expense
Market based RSUs	\$ 3,702
RSUs	\$ 69,956
Total unrecognized compensation expense at June 30, 2023 September 30, 2023	\$ 73,658

10. DECONSOLIDATION OF SUBSIDIARY

As discussed in Note 1, *Basis of Presentation*, on June 30, 2023, the Company transferred ownership of all of Romeo's right, title and interest in and to all of its tangible and intangible assets, subject to certain agreed upon exclusions, to the Assignee. The Company received no cash consideration related to the Assignment.

The Company deconsolidated Romeo as of the Assignment as the Company no longer held a controlling financial interest in Romeo as of that date. The Company did not have any amounts included in accumulated other comprehensive loss associated with Romeo at the time of deconsolidation. The Assignment of Romeo represents a strategic shift and its results are reported as discontinued operations for the prior year periods presented. Following the Assignment, the Company retained no interest in Romeo, and Romeo is not deemed a related party.

In order to deconsolidate Romeo, the carrying values of the assets and liabilities of Romeo were removed from the Company's consolidated balance sheets as of June 30, 2023.

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In connection with the deconsolidation, the Company recognized a loss from deconsolidation of subsidiaries of \$24.9 million which is recorded in loss from deconsolidation of discontinued

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operations in the consolidated statements of operations for the **three and six** **nine** months ended **June 30, 2023** **September 30, 2023** and consisted of the following:

	June 30, 2023	As of deconsolidation
Assets deconsolidated:		
Cash and cash equivalents	\$ 213	213
Accounts receivable, net	—	—
Inventory	7,271	7,271
Prepaid expenses and other current assets	3,351	3,351
Restricted cash and cash equivalents, non-current	1,500	1,500
Property, plant and equipment, net	17,555	17,555
Intangible assets, net	656	656
Investments in affiliates	10,000	10,000
Other assets	23,364	23,364
Total assets deconsolidated	\$ 63,910	63,910
Liabilities deconsolidated:		
Accounts payable	\$ 15,583	15,583
Accrued expenses and other current liabilities	57,612	57,612
Debt and finance lease liabilities, current	1,206	1,206
Long-term debt and finance lease liabilities, net of current portion	1,160	1,160
Operating lease liabilities	21,664	21,664
Warrant liability	8	8
Other non-current liabilities	—	—
Total liabilities deconsolidated	97,233	97,233
Net liabilities derecognized from deconsolidation	(33,323)	(33,323)
Less: intercompany balances derecognized	54,084	54,084
Less: cash payments directly related to deconsolidation	2,724	2,724
Less: derecognition of goodwill	1,450	1,450
Loss from deconsolidation of discontinued operation	\$ 24,935	24,935

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As of December 31, 2022, the assets and liabilities of Romeo subject to assignment for the benefit of creditors have been reflected as assets subject to assignment for the benefit of creditors and liabilities subject to assignment for the benefit of creditors on the Company's consolidated balance sheets and consisted of the following:

	December 31, 2022
Assets:	
Current assets	
Cash and cash equivalents	\$ 7,555
Accounts receivable, net	262
Inventory	11,327
Prepaid expenses and other current assets	9,881
Total current assets subject to assignment for the benefit of creditors	29,025
Non-current assets	
Restricted cash and cash equivalents, non-current	1,500
Property, plant and equipment, net	19,221
Intangible assets, net	621
Investments in affiliates	10,000
Prepayment - Long-term Supply Agreement	44,835
Other assets	23,948
Total non-current assets subject to assignment for the benefit of creditors	100,125
Total assets subject to assignment for the benefit of creditors	\$ 129,150
Liabilities:	
Current liabilities	
Accounts payable	\$ 24,672
Accrued expenses and other current liabilities	22,990
Debt and finance lease liabilities, current	1,440
Total current liabilities subject to assignment for the benefit of creditors	49,102
Long-term liabilities	
Long-term debt and finance lease liabilities, net of current portion	1,499
Operating lease liabilities	22,132
Warrant liability	40
Total long-term liabilities subject to assignment for the benefit of creditors	23,671
Total liabilities subject to assignment for the benefit of creditors	\$ 72,773

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The following represents the major components of loss from discontinued operations presented in the consolidated statements of operations:

	For the three months ended June 30, 2023	For the six months ended June 30, 2023
Revenues	\$ 1,225	\$ 1,665
Cost of revenues	2,272	12,926
Gross loss	(1,047)	(11,261)
Operating expenses:		
Research and development	3,053	5,673
Selling, general and administrative	3,926	14,937
Loss on supplier deposits	44,835	44,835
Total operating expenses	51,814	65,445
Loss from operations	(52,861)	(76,706)
Other income (expense), net		

Interest expense, net	(22)	(53)
Revaluation of warrant liability	—	33
Loss from discontinued operations	\$ (52,883)	\$ (76,726)

For the nine months ended September 30, 2023

Revenues	\$ 1,665
Cost of revenues	12,926
Gross loss	(11,261)
Operating expenses:	
Research and development	5,673
Selling, general and administrative	14,937
Loss on supplier deposits	44,835
Total operating expenses	65,445
Loss from operations	(76,706)
Other income (expense), net	
Interest expense, net	(53)
Revaluation of warrant liability	33
Loss from discontinued operations	\$ (76,726)

11. INCOME TAXES

To calculate the interim tax provision, at the end of each interim period the Company estimates the annual effective tax rate and applies that to its ordinary quarterly earnings. The effect of changes in the enacted tax laws or rates is recognized in the interim period in which the change occurs. The computation of the annual estimated effective tax rate at each interim period requires certain estimates and judgments including, but not limited to, the expected operating income for the year, projections of the proportion of income earned and taxed in foreign jurisdictions, permanent differences between book and tax amounts, and the likelihood of recovering deferred tax assets generated in the current year. The accounting estimates used to compute the provision for income taxes may change as new events occur, additional information is obtained, or the tax environment changes.

Beginning in 2022, the Tax Cuts and Jobs Act ("TCJA") requires taxpayers to capitalize certain research and development costs and amortize them over five or fifteen years pursuant to Internal Revenue Code Section 174. Previously, such costs could be deducted in the period they were incurred. This provision is not anticipated to impact our effective tax rate or result in any cash payments for our federal income taxes.

Income tax expense was immaterial for the three and ~~six~~ nine months ended ~~June 30, 2023~~ September 30, 2023 and 2022 due to cumulative tax losses.

12. COMMITMENTS AND CONTINGENCIES

Legal Proceedings

The Company is subject to legal and regulatory actions that arise from time to time. The assessment as to whether a loss is probable or reasonably possible, and as to whether such loss or a range of such loss is estimable, often involves significant judgment about future events, and the outcome of litigation is inherently uncertain. The Company expenses professional legal fees as incurred, which are included in selling, general, and administrative expense on the consolidated financial statements. Other than as described below, there is no material pending or threatened litigation against the Company that remains outstanding as of ~~June 30, 2023~~ September 30, 2023.

Regulatory and Governmental Investigations and Related Internal Review

In September 2020, a short seller reported on certain aspects of the Company's business and operations. The Company and its board of directors retained Kirkland & Ellis LLP to conduct an internal review in connection with the short-seller article

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(the "Internal Review"), and Kirkland & Ellis LLP promptly contacted the Division of Enforcement of the SEC to make it aware of the commencement of the Internal Review. The Company subsequently learned that the Staff of the Division of Enforcement and the United States Attorney's Office for the Southern District of New York (the "SDNY") had opened investigations.

By order dated December 21, 2021, the Company and the SEC reached a settlement arising out of the SEC's investigation of the Company, Company related to a short-seller article published in September 2020. Under the terms of the settlement,

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without admitting or denying the SEC's findings, the Company among other things, agreed to pay a \$125 million civil penalty. The first \$25 million installment was paid at the end of 2021 and the remaining installments to be paid semiannually through 2023. The Company previously reserved the full amount of the settlement in the quarter ended September 30, 2021, as disclosed in the Company's quarterly report on Form 10-Q for such quarter, filed with the SEC on November 4, 2021. In July 2022, the Company and SEC agreed to an alternative payment plan with the first two payments of \$5 million to be paid in July 2022 and December 2022. The July 2022 and December 2022 payments have been made by the Company. In February 2023, the Company and the SEC agreed to another alternative payment plan, with the next two payments of \$1.5 million each to be paid in March 2023 and June 2023. The March 2023 and June 2023 payments have been made by the Company. In August 2023, the Company and the SEC agreed to an additional payment of \$1.5 million to be paid in September 2023, which has been made by the Company. The remainder of the payment plan is subject to determination. As of June 30, 2023, the Company has reflected the remaining liability of \$87.0 million in accrued expenses and other current liabilities on the consolidated balance sheets.

The legal and other professional costs the Company incurred during the three and **six** months ended **June 30, 2023** **September 30, 2023** in connection with the Internal Review and legal work disclosed elsewhere in this Report include approximately zero and \$0.2 million, respectively, expensed for Mr. Milton's attorneys' fees under his indemnification agreement with the Company. During the three and **six** months ended **June 30, 2022** **September 30, 2022** the Company expensed **\$9.0** **\$6.0** million and **\$19.6** **\$25.5** million, respectively, for Mr. Milton's attorneys' fees under his indemnification agreement with the Company. As of **June 30, 2023** **September 30, 2023** and December 31, 2022, accrued expenses for legal and other professional costs for Mr. Milton's attorneys' fees under his indemnification agreement were immaterial.

To the extent that these investigations and any resulting third-party claims yield adverse results over time, such results could jeopardize the Company's operations and exhaust its cash reserves, and could cause stockholders to lose their entire investment.

The Company is currently seeking reimbursement from Mr. Milton for costs and damages arising from the actions that are the subject of the government and regulatory investigations. On October 20, 2023, an arbitration panel in New York, New York awarded the Company approximately \$165 million plus interest in an arbitration proceeding against Mr. Milton. The Company intends to file with the arbitration panel an application to recover attorneys' fees related to the matter. The Company's ability to enforce the arbitration award and recover any judgment from the counterparty is not guaranteed and could result in no recovery.

Shareholder Securities Litigation

The Company and certain of its current and former officers and directors are defendants in a consolidated securities class action lawsuit pending in the United States District Court of the District of Arizona (the "Shareholder Securities Litigation"). On December 15, 2020, the United States District Court for the District of Arizona consolidated the actions under lead case *Borteanu v. Nikola Corporation, et al.*, No. CV-20-01797-PXL-SPL, and appointed Angelo Baio as the "Lead Plaintiff". On December 23, 2020, a motion for reconsideration of the Court's order appointing the Lead Plaintiff was filed. On December 30, 2020, a petition for writ of mandamus seeking to vacate the District Court's Lead Plaintiff order and directing the court to appoint another Lead Plaintiff was filed before the United States Court of Appeals for the Ninth Circuit, Case No. 20-73819. The motion for reconsideration was denied on February 18, 2021. On July 23, 2021, the Ninth Circuit granted in part the mandamus petition, vacated the district court's December 15, 2020 order, and remanded the case to the District Court to reevaluate the appointment of a Lead Plaintiff. On November 18, 2021, the Court appointed Nikola Investor Group II as Lead Plaintiff. On January 24, 2022, Lead Plaintiffs filed the Consolidated Amended Class Action Complaint which asserts claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and Rule 10b-5 promulgated thereunder, based on allegedly false and/or misleading statements and omissions in press releases, public filings, and in social media regarding the Company's business plan and prospects. In accordance with the Court's scheduling order, Defendants filed their motions to dismiss on April 8, 2022. On May 9, 2022, Plaintiffs filed their opposition to Defendants' motions to dismiss, and on June 8, 2022, Defendants filed their reply briefs. On February 2, 2023, the court issued a ruling granting the Defendants' motions to dismiss, without prejudice. As a result, Plaintiffs' complaint was dismissed in its entirety, with leave to amend by April 3, 2023. On April 3, 2023, Plaintiff's filed the Second Consolidated Amended Class Action Complaint. In accordance with the Court's scheduling order, Defendants filed their motions to dismiss the Second Consolidated Amended Class Action Complaint on May 15, 2023. On June 14, 2023, Plaintiffs filed their oppositions to Defendants' motions to dismiss, and on June 29, 2023, Defendants filed their reply briefs. The Court has not yet ruled on the motions.

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Plaintiffs seek an unspecified amount in damages, attorneys' fees, and other relief. The Company intends to vigorously defend itself. The Company is unable to estimate the potential loss or range of loss, if any, associated with these lawsuits, which could be material.

Derivative Litigation

Beginning on September 23, 2020, two purported shareholder derivative actions were filed in the United States District Court for the District of Delaware (*Byun v. Milton, et al.*, Case No. 1:20-cv-01277-UNA; *Salguocar v. Girskey et. al.*, Case No. 1:20-cv-01404-UNA), purportedly on behalf of the Company, against certain of the Company's current and former directors alleging breaches of fiduciary duties, violations of Section 14(a) of the Exchange Act, and gross mismanagement. The *Byun* action also brings claims for unjust enrichment and abuse of control, while the *Salguocar* action brings a claim for waste of corporate assets. On October 19, 2020, the *Byun* action was stayed until 30 days after the earlier of (a) the Shareholder Securities Litigation being dismissed in their entirety with prejudice; (b) defendants filing an answer to any complaint in the Shareholder Securities Litigation; or (c) a joint request by plaintiff and defendants to lift the stay. On November 17, 2020, the *Byun* and *Salguocar* actions were consolidated as *In re Nikola Corporation Derivative Litigation*, Lead Case No. 20-cv-01277-CFC. In its order consolidating the actions, the Court applied the *Byun* stay to the consolidated action. On January 31, 2023, plaintiffs filed an amended complaint. The consolidated action remains stayed.

On December 18, 2020, a purported shareholder derivative action was filed in the United States District Court for the District of Arizona, *Huhn v. Milton et al.*, Case No. 2:20-cv-02437-DWL, purportedly on behalf of the Company, against certain of the Company's current and former directors alleging breaches of fiduciary duties, violations of Section 14(a) of the Exchange Act, unjust enrichment, and against defendant Jeff Ubben, a member of the Company's board of directors, insider selling and misappropriation of information. On January 26, 2021, the *Huhn* action was stayed until 30 days after the earlier of (a) the Shareholder Securities Litigation being dismissed in its entirety with prejudice;

(b) defendants filing an answer to any complaint in the Shareholder Securities Litigation; or (c) a joint request by plaintiff and defendants to lift the stay. The *Huhn* action remains stayed.

On January 7, 2022, Barbara Rhodes, a purported stockholder of the Company, filed her Verified Stockholder Derivative Complaint in Delaware Chancery Court captioned *Rhodes v. Milton, et al. and Nikola Corp.*, C.A. No. 2022-0023-KJSM (the "Rhodes Action"). On January 10, 2022, Zachary BeHage and Benjamin Rowe, (together, the "BeHage Rowe Plaintiffs"), purported stockholders of the Company, filed their Verified Shareholder Derivative Complaint in Delaware Chancery Court captioned *BeHage v. Milton, et al. and Nikola Corp.*, C.A. No. 2022-0045-KJSM (the "BeHage Rowe Action" together with the Rhodes Action, the "Related Actions"). The Related Actions These actions are against certain of the Company's current and former directors and allege breach of fiduciary duties, insider selling under *Brophy*, aiding and abetting insider selling, aiding and abetting breach of fiduciary duties, unjust enrichment, and waste of corporate assets. On January 28, 2022 February 1, 2022, the Court consolidated the Rhodes Action and the BeHage Rowe Plaintiffs filed a stipulation and proposed order for consolidation of the Related Actions. The proposed order states that Defendants need not answer, move, or otherwise respond to the complaints filed in the Related Actions and contemplates that counsel for Plaintiffs shall file a consolidated complaint or designate an operative complaint within fourteen days of entry of an order consolidating these actions and shall meet and confer with counsel for Defendants or any other party regarding a schedule for Defendants to respond to the operative complaint. The Court granted this proposed order on February 1, 2022 and consolidated the Related Actions Action as *In re Nikola Corporation Derivative Litigation*, C.A. No. 2022-0023-KJSM (the "Consolidated Related Actions" Chancery Action"). On February 15, 2022, Rhodes The Consolidated Chancery Action was stayed through February 2, 2022 on a combination of joint stipulations and the BeHage Rowe court orders. Plaintiffs then filed a Verified Consolidated Amended Stockholder Derivative Complaint in the Related Actions (the "Amended Complaint"). On April 4, 2022, the parties filed a stipulation and proposed order, pursuant to which the parties to the Related Actions agreed that Defendants need not answer, move, or otherwise respond to certain counts of the Amended Complaint. In accordance with the Court-ordered stipulation, Defendants filed their motions to stay the remaining counts of the Amended Complaint on April 13, 2022. Plaintiffs filed their oppositions on May 4, 2022, and Defendants filed their replies on May 25, 2022. In a bench ruling following a telephonic oral argument on June 1, 2022, the Court granted Defendants' motions to stay the remaining counts of the Amended Complaint. The Court ordered the Defendants to submit a status report on October 31, 2022, or within three days of receipt of a decision on the motions to dismiss in the Shareholder Securities Litigation, whichever comes first, in which Defendants can request a continued stay of the Related Actions. The stay was subsequently extended until January 10, 2023, by court order and, on January 12, 2023, the parties entered into a stipulation staying in the actions until the earlier of February 14, 2023 or a resolution of the motions to dismiss in the Shareholder Securities Litigation. The stay was automatically lifted on February 2, 2023, when the Shareholder Securities Litigation was dismissed. Plaintiffs filed an second amended complaint on February 14, 2023 (the "Second Amended Complaint"). On March 10, 2022, Michelle Brown and Crisanto Gomes, (together, the "Brown & Gomes Plaintiffs"), purported

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stockholders of the Company, filed their Verified Shareholder Derivative Complaint in Delaware Chancery Court captioned *Brown v. Milton, et al. and Nikola Corp.*, C.A. No. 2022-0223-KJSM (the "Brown & Gomes Action"). The Brown & Gomes Action is likewise alleges claims against certain of the Company's current and former directors and alleges claims against those defendants for purported breaches of fiduciary duty and unjust enrichment. On March 14, 2022, the Brown & Gomes Plaintiffs notified the court in the Related Actions of their belief that the Brown & Gomes Action properly belongs as part of the Consolidated Related Actions. On January 12, 2023, the parties entered into a stipulation consolidating the Brown & Gomes Action in the Consolidated Related Actions. Chancery Derivative Action. On May 3, 2023, each of the current and former director defendants moved to partially dismiss the amended complaint. Second Amended Complaint. Briefing is scheduled to conclude by concluded on August 25, 2023, and oral argument is scheduled for October 13, 2023 December 8, 2023.

The complaints seek unspecified monetary damages, costs and fees associated with bringing the actions, and reform of the Company's corporate governance, risk management and operating practices. The Company intends to vigorously defend against the foregoing complaints. The Company is unable to estimate the potential loss or range of loss, if any, associated with these lawsuits, which could be material.

In addition, on March 8, 2021, the Company received a demand letter from a law firm representing a purported stockholder of the Company alleging facts and claims substantially the same as many of the facts and claims in the filed derivative shareholder lawsuit. The demand letter requests that the board of directors (i) undertake an independent internal investigation into certain board members and management's purported violations of Delaware and/or federal law; and (ii) commence a civil action against those members of the board and management for alleged fiduciary breaches. In April 2021, the board of directors formed a demand review committee, consisting of independent directors Bruce L. Smith and Mary L. Petrovich, to review such demands and provide input to the Company and retained independent counsel. Upon completion of the independent internal investigation by the demand review committee, it was recommended that the board take no action in response to the demand letter at this time. The independent counsel for the demand review committee provided an update to

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counsel for the stockholder who sent the demand letter. There can be no assurance as to whether any litigation will be commenced by or against the Company by the purported shareholder with respect to the claims set forth in the demand letter, or whether any such litigation could be material.

Additionally, on December 23, 2022, the Company received another demand letter from a law firm representing a purported stockholder of the Company, Ed Lomont, alleging facts and claims substantially the same as many of the facts and claims in the filed derivative shareholder lawsuits. The demand letter requests requested that the board's demand review committee (i) undertake an independent internal investigation into certain board members and management's purported violations of Delaware and/or federal law; and (ii) commence a civil action against those members of the board and management for alleged fiduciary breaches. In February 2023, the board of directors reengaged the demand review committee, consisting of independent directors Bruce L. Smith, and Mary L. Petrovich, to review such demands and provide input to the Company and retained independent counsel. There can

On September 6, 2023, Lomont filed a Verified Stockholder Derivative Complaint in Delaware Chancery Court captioned *Lomont v. Milton, et al.*, C.A. No. 2023-0908-KSJM (the "Lomont Action") against certain of the Company's current and former directors, alleging claims against those defendants for purported breaches of fiduciary duty, unjust enrichment, and contribution and indemnification. The Lomont Action alleges that the Company constructively and wrongfully refused Lomont's demand that the Company bring claims against officers and directors. The parties have not yet entered into a schedule for the Lomont Action.

The complaints seek unspecified monetary damages, costs and fees associated with bringing the actions, and reform of the Company's corporate governance, risk management and operating practices. The Company is vigorously defending against the foregoing complaints. The Company is unable to estimate the potential loss or range of loss, if any, associated with these lawsuits, which could be no assurance as to whether any litigation will be commenced by or material.

Tenneson Action

On October 13, 2023, John Tenneson filed a purported securities class action in the United States District Court for the District of Arizona, captioned *Tenneson v. Nikola et al.*, Case No. 2:23-cv-02131-DJH (the "Tenneson Action"). The Tenneson Action asserts claims against the Company **by** and certain officers and directors asserts under Sections 10(b) and 20(a) of the **purported shareholder** Exchange Act, and Rule 10b-5 promulgated thereunder, based on allegedly false and/or misleading statements and omissions in press releases, public filings, and in social media **regarding** the Company's safety and structural controls related to its manufacturing of battery components and the likelihood of a product recall.

Plaintiff seeks an unspecified amount in damages, attorneys' fees, and other relief. The Company intends to vigorously defend itself. The Company is unable to estimate the potential loss or range of loss, if any, associated with respect to the **claims** set forth in the demand letter, or whether any such litigation **Tenneson Action**, which could be material.

Lion Electric matter

On March 2, 2023, Lion Electric filed a complaint against Nikola in Arizona federal district court alleging that Nikola tortiously interfered with the Romeo Power, Inc. / Lion Electric business relationship and Lion's business expectancy from the commercial relationship. Nikola denies the allegations and intends to vigorously defend the matter. Based upon information presently known to management, the Company is not currently able to estimate the outcome of this proceeding or a possible range of loss, if any.

Lightning eMotors matter

On March 9, 2023, Lightning eMotors filed a complaint in **Colorado State Court** alleging that Nikola tortiously interfered with the Romeo Power, Inc. / Lightning eMotors business relationship and Lightning's business expectancy. Nikola denies the allegations and intends to vigorously defend the matter. Based upon information presently known to management, the Company is not currently able to estimate the outcome of this proceeding or a possible range of loss, if any.

All State Fastener matter

On February 28, 2023, All State Fastener (ASF) filed a complaint in the eastern district of Michigan alleging breaches of contract against Nikola. The basis of the allegations **relates** to a dispute for the supply of fasteners used in Nikola's vehicles. ASF alleges that Nikola has breached the purchase order agreement. Nikola denies the allegations and **intends** to vigorously

NIKOLA CORPORATION NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (UNAUDITED)

defend the matter. Based upon information presently known to management, the Company is not currently able to estimate the outcome of this proceeding or a possible range of loss, if any.

Commitments and Contingencies

FCPM License

In the third quarter of 2021, the Company entered into a FCPM license to intellectual property that will be used to adapt, further develop and assemble FCPMs. Payments for the license will be due in installments ranging from 2022 to 2025. As of **June 30, 2023** **September 30, 2023** and **December 31, 2022**, the Company accrued **\$13.6 million** **\$13.2 million** and **\$32.1 million, respectively**, in accrued expenses and other current liabilities and **\$19.1 million** **\$5.3 million** and zero, respectively, in other long-term liabilities on the consolidated balance sheets.

Inventory Repurchase Agreements

During the first quarter of 2023, the Company entered into an arrangement with a finance company to provide floor plan financing to its dealers (the "Floor Plan"). The Company receives payment from the finance company following shipment of trucks to the dealers, and the Company participates in the cost of dealer financing up to certain limits. In conjunction with the Floor Plan, the Company entered into an inventory repurchase agreement (the "Inventory Repurchase Agreement") with the finance company, whereby the Company has agreed to repurchase trucks re-possessed by the financing company in the event of a dealer default, at the financing company's option. As of **June 30, 2023** **September 30, 2023**, the maximum potential cash payments the Company could be required to make under the terms of the Inventory Repurchase Agreement was **\$12.3 million** **\$11.9 million**. The Company's financial exposure under the Inventory Repurchase Agreement is limited to the difference between the amount paid to the financing company and the amount received upon subsequent resale of the re-possessed truck. As of **June 30, 2023** **September 30, 2023**, the Company had not repurchased any trucks under the terms of the Inventory Repurchase Agreement, nor received any requests for repurchase.

Leases executed BEV Recall Campaign

On August 11, 2023, the Company announced a voluntary recall of approximately 209 BEV trucks, as a result of the preliminary results of the Company's battery pack thermal event investigations. The incident was deemed likely caused by a defect within components of the supplier battery pack. The Company has ceased investigations of the thermal event and has determined that replacement of the battery pack in all BEV trucks is the safest, most cost effective remedy. All BEV trucks are being transported to the Company's Coolidge manufacturing facility to be retrofit with alternative battery packs.

Amounts accrued for the recall campaign are based on management's best estimates of the amounts that will ultimately be required to settle such items. The Company can provide no assurances that it will not yet commence experience material claims in the future or that it will not incur significant costs to defend or settle such claims beyond the amounts accrued. The Company accrued \$61.8 million during the third quarter of 2023 related to the recall campaign.

During the three months ended June 30, 2023

Purchase Commitments

As of September 30, 2023, the Company entered various lease into agreements related with four liquid hydrogen suppliers which require a minimum commitment of product purchases on a take-or-pay basis starting in the fourth quarter of 2023. The Company's purchase obligations with these suppliers contain minimum purchase quantities, provisions for price adjustments, and in certain instances, are contingent on the supplier's expected construction of the production site and commencement of production by a certain deadline. As of September 30, 2023, minimum future product purchases are estimated to hydrogen fueling infrastructure which have not yet commenced. Undiscounted lease payments related to these obligations are \$2.5 million, \$1.3 million during the fourth quarter of 2023, \$10.1 million during 2024, \$62.6 million during 2025, \$143.4 million during 2026, and \$491.0 million thereafter through December 31, 2029.

NIKOLA CORPORATION
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
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13. NET LOSS PER SHARE

The following table sets forth the computation of the basic and diluted net loss per share for the three and six months ended June 30, 2023 September 30, 2023 and 2022:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2023	2022	2023	2022
Numerator:				
Net loss from continuing operations	\$ (140,010)	\$ (172,997)	\$ (285,261)	\$ (325,938)
Net loss from discontinued operations	\$ (77,818)	—	\$ (101,661)	—
Net loss	\$ (217,828)	\$ (172,997)	\$ (386,922)	\$ (325,938)
Denominator:				
Weighted average shares outstanding, basic and diluted	708,692,817	425,323,391	629,630,362	420,266,181
Net loss per share, basic and diluted:				
Net loss from continuing operations	\$ (0.20)	\$ (0.41)	\$ (0.45)	\$ (0.78)
Net loss from discontinued operations	\$ (0.11)	—	\$ (0.16)	—
Net loss	\$ (0.31)	\$ (0.41)	\$ (0.61)	\$ (0.78)

NIKOLA CORPORATION
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	Three Months Ended September 30,		Nine Months Ended September 30,	
	2023	2022	2023	2022
Numerator:				
Net loss from continuing operations	\$ (425,764)	\$ (236,234)	\$ (711,025)	\$ (562,172)
Net loss from discontinued operations	—	—	\$ (101,661)	—
Net loss	\$ (425,764)	\$ (236,234)	\$ (812,686)	\$ (562,172)
Denominator:				
Weighted average shares outstanding, basic and diluted	857,213,992	438,416,393	706,325,212	426,382,736
Net loss per share, basic and diluted:				
Net loss from continuing operations	\$ (0.50)	\$ (0.54)	\$ (1.01)	\$ (1.32)
Net loss from discontinued operations	\$ —	\$ —	\$ (0.14)	—
Net loss	\$ (0.50)	\$ (0.54)	\$ (1.15)	\$ (1.32)

Basic net loss per share is computed by dividing net loss for the period by the weighted-average number of common shares outstanding during the period.

Diluted net loss per share is computed by dividing the net loss, adjusted for the revaluation of warrant liability for the private warrants, by the weighted average number of common shares outstanding for the period, adjusted for the dilutive effect of shares of common stock equivalents resulting from the assumed exercise of the warrants. The

treasury stock method was used to calculate the potential dilutive effect of these common stock equivalents. There were no adjustments for revaluations of the warrant liability as the warrants outstanding are anti-dilutive for all periods presented.

Potentially dilutive shares were excluded from the computation of diluted net loss when their effect was antidilutive. The following outstanding common stock equivalents were excluded from the computation of diluted net loss per share for the periods presented because including them would have been anti-dilutive.

	Toggle Convertible Notes (on an as-converted basis)	Three Months Ended June 30,		Six Months Ended June 30,		Three Months Ended September 30,		Nine Months Ended September 30,		
		2023	2022	2023	2022	2023	2022	2023	2022	
Toggle Convertible Notes (on an as-converted basis)	Toggle Convertible Notes (on an as-converted basis)	93,262,255	22,872,040	93,262,255	22,872,040	20,803,462	22,872,040	20,803,462	22,872,040	
Senior Convertible Notes (on an as-converted basis)	Senior Convertible Notes (on an as-converted basis)					21,232,749	—	21,232,749	—	
Outstanding warrants	Outstanding warrants	464,248	760,915	464,248	760,915	841,183	760,915	841,183	760,915	
Stock options, including performance	Stock options, including performance					15,158,448	27,385,088	15,158,448	27,385,088	
stock options	stock options	21,551,427	28,683,739	21,551,427	28,683,739	Restricted stock units, including market based				
Restricted stock units, including market based	Restricted stock units, including market based					17,001,793	23,911,805	17,001,793	23,911,805	
RSUs	RSUs	20,728,159	32,262,297	20,728,159	32,262,297	RSUs				
Total	Total	136,006,089	84,578,991	136,006,089	84,578,991	Total	75,037,635	74,929,848	75,037,635	74,929,848

14. SUBSEQUENT EVENTS

FFI Purchase Agreement Conversion of Senior Convertible Notes

In July 2023, the Company executed a membership interest and asset purchase agreement (the "Purchase Agreement") with FFI Phoenix Hub Holdings, LLC, a wholly-owned subsidiary of Fortescue Future Industries ("FFI"). Pursuant to the terms of the Purchase Agreement, FFI Phoenix Hub Holdings, LLC, will acquire 100% of the interests in Phoenix Hydrogen Hub, LLC, the Company's wholly owned subsidiary holding the assets related to the Phoenix hydrogen hub project. The Company received net proceeds of \$20.7 million in July 2023 related to the first closing under the Purchase Agreement.

Sale of Common Stock

In July 2023, the Company issued an aggregate of 7,012,880 30,231,974 shares of common stock under for settlement of conversions of \$34.0 million aggregate principal amount of the Equity Distribution Second Purchase Agreement for gross proceeds of \$9.9 million.

Authorized Common Stock

On August 3, 2023, the Company held its 2023 Annual Meeting of Stockholders (the "Annual Meeting"). At the Annual Meeting, the Company's stockholders approved an amendment Notes and make-whole interest pursuant to the Company's Certificate of Incorporation to increase the number of authorized shares of common stock from 800,000,000 to 1,600,000,000.

Second Purchase Agreement.

ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

This report contains forward-looking statements that are not historical facts. When used in this report, words such as "believe," "may," "will," "estimate," "continue," "anticipate," "intend," "expect," "should," "would," "could," "plan," "predict," "potential," "target," "goal," "strategy," "seem," "seek," "future," "outlook," and similar expressions are intended to identify forward looking statements. These are statements that predict or indicate future events or trends or that are not statements of historical matters. These forward-looking statements include, but are not limited to, statements regarding the company's expectations regarding its business and the potential benefits received from the planned integrated offering of trucks and fueling solutions, including the Tre FCEV and mobile fuelers, and its belief that its integrated fueling and charging systems is the key differentiator and will create competitive benefits; the potential benefits received from the company's hydrogen production, offtake, distribution and dispensing plans; the expected performance and specifications of company vehicles and hydrogen production, distribution and fueling solutions; the benefits and attributes of the company's business model and strategy; the company's expectations regarding its projected truck builds and related specifications; the company's expectations for its trucks and market acceptance of electric trucks; expected benefits of the company's strategic partnerships; the company's plans with respect to its bundled lease program; potential leasing arrangements; the company's plans with respect to its maintenance and service program; our future capital requirements and ability to raise capital; expected uses of our common stock; beliefs regarding our competitive position; market opportunity; expectations regarding expense levels; and market

opportunity, expected scope, costs and timing related to the battery-electric truck recall, including the nature of the repairs, expected costs to repair the vehicles and timing of such expenses, and any potential offsets, timing of battery replacement and truck deliveries. These statements are based on various assumptions, whether or not identified in this report, and on the current expectations of management and are not predictions of actual performance. These assumptions include our financial and business performance; expected timing with respect to the build out of our manufacturing facility, and production and attributes of our FCEV and BEV trucks; expectations regarding our hydrogen fuel station rollout plan; timing of completion of validation testing, volume production and other milestones; changes in our strategy, future operations, financial position, estimated revenues and losses, projected costs, prospects and plans; the execution of definitive agreements with our business partners and the success of our planned collaborations; the failure to convert LOIs or MOUs into binding orders; the cancellation of orders; our future capital requirements and sources and uses of cash; costs of capital; the potential outcome of investigations, litigation, complaints, product liability claims and/or adverse publicity; the implementation, market acceptance and success of our business model; developments relating to our competitors and industry; the impact of health epidemics including the COVID-19 pandemic, on our business and the actions we may take in response thereto; our expectations regarding our ability to obtain and maintain intellectual property protection and not infringe on the rights of others; our ability to obtain funding for our operations and planned operations; the impact of inflation on our business; our business, expansion plans and opportunities; our ability to achieve cost reductions for our vehicles; customer demand for our trucks; assumptions regarding our recall campaign; the continued availability of government incentives; changes in applicable laws or regulations; and anticipated trends and challenges in our business and the markets in which we operate.

Forward-looking statements are subject to risks and uncertainties that could cause actual results to differ materially from those expected. These risks and uncertainties include, but are not limited to, those risks discussed in Item 1A of this report, as well as our ability to execute our business model, including market acceptance of our products and planned services; changes in applicable laws or regulations; risks associated with the outcome of any legal, regulatory, or judicial proceedings; the effect of the COVID-19 pandemic on our business; our ability to raise capital; capital and the terms thereof; our ability to service or repay our debt; our ability to compete; the success of our business collaborations; regulatory developments in the United States; the possibility that we may be adversely affected by other economic, business, and/or competitive factors; risks related to the recall, including higher than expected costs, the discovery of additional problems, delays retrofitting the trucks and delivering such trucks to customers, supply chain and other issues that may create additional delays, order cancellations as a result of the recall, litigation, complaints and/or product liability claims, and reputational harm; and our history of operating losses. These forward-looking statements speak only as of the date hereof. We expressly disclaim any obligation or undertaking to update any forward-looking statements contained herein to reflect any change in our expectations with regard thereto or any change in events, conditions or circumstances on which any such statement is based.

In this report, all references to "Nikola," "we," "us," or "our" mean Nikola Corporation.

Nikola™ and HYLA are trademarks of Nikola Corporation. We also refer to trademarks of other corporations and organizations in this report.

NIKOLA CORPORATION
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The below discussion should be read in conjunction with Management's Discussion and Analysis of Financial Condition and Results of Operations and the audited consolidated financial statements and notes thereto included in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended.

Overview

We are a technology innovator and integrator, working to develop innovative energy and transportation solutions. We are pioneering a business model that will enable customers to integrate next-generation truck technology, hydrogen fueling infrastructure, charging solutions, and related maintenance. By creating this ecosystem, we and our strategic business partners and suppliers hope to build a long-term competitive advantage for clean technology vehicles and next generation fueling solutions.

Our expertise lies in design, innovation, and software and engineering. We assemble, integrate, and commission our vehicles in collaboration with our business partners and suppliers. Our approach has always been to leverage strategic partnerships to help lower cost, increase capital efficiency and increase speed to market.

We operate in two business units: Truck and Energy. The Truck business unit is developing and commercializing FCEV and BEV Class 8 trucks that provide or are intended to provide environmentally friendly, cost-effective solutions to the short, medium and long haul trucking sectors. The Energy business unit is developing hydrogen fueling infrastructure to support our FCEV customers.

Late in the first quarter of 2022, we commenced commercial production of Tre BEVs at our manufacturing facility in Coolidge, Arizona, and commercial production of the Tre FCEV commenced at started in the manufacturing facility on July 31, 2023, third quarter of 2023.

In January 2023, we announced our new global brand, HYLA, to encompass our energy products for producing, distributing, and dispensing hydrogen to fuel our trucks. Under HYLA, we announced our intention to secure up to 300 metric tons per day of hydrogen supply by 2026 in the U.S. and Canada, which is intended to support the development of our trucks. We expect to leverage multiple ownership structures where we either fully or partially own, or do not own hydrogen production assets. In cases where we are able to source hydrogen supply without ownership of hydrogen production assets, we expect to enter into long-term supply contracts where our costs and surety of supply are well-defined.

We intend to continue to develop our business, which includes the following ongoing activities:

- commercialize our heavy-duty trucks and other products;
- expand and maintain manufacturing facilities and equipment;
- invest in servicing our vehicles under warranty including repairs and service parts;
- develop hydrogen fueling infrastructure;
- continue to invest in our technology;
- increase our investment in marketing and advertising, sales, and distribution infrastructure for our products and services;
- maintain and improve our operational, financial and management information systems;

- hire and retain personnel;
- obtain, maintain, expand, and protect our intellectual property portfolio; and
- operate as of public company.

Comparability of Financial Information

On June 30, 2023, we completed the Assignment of Romeo, which was previously consolidated in our financial statements from the date of acquisition, October 14, 2022. As of the Assignment, we are reporting the results of Romeo within discontinued operations. Our results for the periods presented, as discussed in this Management's Discussion and Analysis of Financial Condition and Results of Operations, are presented on a continuing operations basis.

Recent Developments

- On July 5, 2023, we announced that the California Transportation Commission (CTC) has awarded Nikola a \$41.9 million grant under the Trade Corridor Enhancement Program (TCEP) to build six heavy-duty hydrogen refueling stations across Southern California.
- On July 13, 2023, we announced our partnership with BayoTech to purchase up to 50 Nikola Class 8 hydrogen fuel cell electric vehicles over the next five years. We expect to take delivery of low-carbon hydrogen produced by BayoTech in Missouri and California and plan to acquire up to 10 BayoTech transport trailers, facilitating distribution of hydrogen from the production sites.
- On July 19, 2023, we announced Fortescue Future Industries ("FFI"), will acquire our Phoenix hydrogen hub project. We are working with FFI on a hydrogen supply agreement to support our FCEV trucks.
- On July 31, 2023, we started serial production of the Nikola Tre FCEV at our Coolidge, Arizona manufacturing facility with deliveries to our dealers expected to begin late in the third quarter of 2023.

Key Factors Affecting Operating Results

We believe that our performance and future success depend on several factors that present significant opportunities for us but also pose risks and challenges, including those set forth in the section entitled "Risk Factors."

We started serial production at our Coolidge, Arizona manufacturing facility in March 2022 and began sales of Tre BEV trucks in the second quarter of 2022. In the second quarter of 2023, we produced 33 Tre BEV trucks and shipped 45 Tre BEV trucks to our dealer network. As of June 30, 2023, we had 139 Tre BEV trucks in inventory. During the second quarter of 2023, we transitioned the manufacturing line to a mixed model production line in preparation for the commencement of commercial production of the FCEV starting on July 31, 2023. The mixed model line will produce BEV and FCEVs on a build-to-order basis.

Tre BEVs	Q2 2022	Q3 2022	Q4 2022	Q1 2023	Q2 2023
Produced	50	75	133	63	33
Shipped	48	63	20	31	45

We sell our trucks to dealers in our network and rely on the dealers to sell them to end users. We have experienced delays in receiving additional purchase orders from our dealers due in part to lack of charging infrastructure. The end users of the Tre BEV will need to continuously assess their charging capacity and may need to build or expand infrastructure prior to ordering or receiving trucks from the dealers.

Truck Production and Shipments

We started commercial production at our Coolidge, Arizona manufacturing facility in March 2022 and began sales of Tre BEV trucks in the second quarter of 2022. During the third quarter of 2023, production and sales of the Tre BEV was impacted significantly by the voluntary recall of BEV trucks.

In addition, dealers have August 2023, we placed a temporary hold on all new BEV truck shipments. The recall was initiated in response to investigations prompted by a battery pack thermal event. During these investigations it was discovered that additional process and design changes may be necessary and that cell-level issues may need to be addressed beyond the initially identified coolant manifold replacement. While the inquiries continue to experience delays identify the root causes of battery malfunctions, to minimize vehicle downtime and maximize customer safety and satisfaction, the battery packs in receiving proceeds existing dealer and customer trucks will be retrofit with battery packs from an alternative supplier. As of September 30, 2023, we accrued recall campaign costs of \$61.8 million for the California Hybrid Zero Emission Truck BEV trucks that are expected to be returned to dealers and Voucher Incentive Program ("HVIP"), customers once the New York Truck Voucher Incentive Program ("NYVIP") and recall is complete. The battery replacement is expected to commence in late 2023, with the New Jersey Zero-Emission Incentive Program ("NZIP") first set of trucks expected to be returned to customers starting in the first quarter of 2024, pending supply chain or other government incentive programs, which many issues.

All BEV truck inventory is currently classified as work in process inventory as we are removing the existing battery packs off the trucks and plan to retrofit the BEV inventory with alternative battery packs.

Tre BEVs	Q2 2022	Q3 2022	Q4 2022	Q1 2023	Q2 2023	Q3 2023
Produced	50	75	133	63	33	N/A
Shipped	48	63	20	31	45	3

During the second quarter of 2023, we transitioned the manufacturing line to a mixed model production line in preparation for the first time. To qualify for HVIP, NYVIP commencement of commercial production of the FCEV starting on July 31, 2023. In the third quarter of 2023, six Tre FCEV trucks came off the assembly line and NZIP, the dealers are required to complete extensive training, initiate and complete applications for each sales order, and complete the voucher redemption process upon delivery to the end user. In addition, there have and may continue to be delays were in end user purchase orders due to general economic conditions, which in turn could delay dealer purchase orders issued to us, final quality review as of September 30, 2023.

We require substantial additional capital to develop produce and validate our products including the Tre FCEV trucks, and services and fund operations for the foreseeable future. Until we can generate sufficient revenue and positive gross margins, we expect to finance our operations through a combination of existing cash on hand, sales of stock, debt financings, strategic partnerships, and licensing arrangements. The amount and timing of our future funding requirements will depend on many factors, including the pace and results of our development and validation efforts, demand for our trucks and expense levels, among other things.

Basis of Presentation

Currently, we conduct business through one operating segment. See Note 2 in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, for more information.

Components of Results of Continuing Operations

Revenues

Truck sales: During the three and six months ended June 30, 2023, our truck Truck sales were are derived from deliveries of our Tre BEV trucks to dealers.

Service and other: During the three and six months ended June 30, 2023, service Service and other revenues included primarily include sales from delivered Mobile Charging Trailers ("MCTs"), other charging products to dealers and customers, and service parts and labor.

Cost of Revenues

Truck sales: Cost of revenue includes direct parts, material and labor costs, manufacturing overhead, including amortized tooling costs and depreciation of our Coolidge manufacturing facilities, freight and duty costs, reserves for estimated warranty and recall campaign expenses and inventory write-downs.

Service and other: Cost of revenues primarily related to MCT, other charging products, and service part sales primarily include direct materials, outsourced manufacturing services, and fulfillment costs.

Research and Development Expense

Research and development expenses consist primarily of costs incurred for the discovery and development of our vehicles, which include:

- Personnel related expenses, including salaries, benefits, and stock-based compensation expense, for personnel in our engineering and research functions;
- Expenses related to materials, supplies and third-party services, including prototype parts, tooling and non-recurring engineering;
- Fees paid to third parties such as consultants and contractors for outside development and validation activities;
- Depreciation for prototyping equipment and R&D facilities; and
- Expenses related to operating the Coolidge manufacturing facility until the start of commercial production. With the start of commercial production of the Tre BEV late in the first quarter of 2022, manufacturing costs, including labor and overhead, as well as inventory-related expenses related to the Tre BEV trucks, and related facility costs, are no longer recorded in research and development but are reflected in cost of revenues.

During the three and six months ended June 30, 2023 September 30, 2023, our research and development expenses were primarily incurred in connection with development and validation of our FCEV trucks. We expect our Our research and development costs have decreased and are expected to continue to decrease with the commencement of FCEV serial production on July 31, 2023, at which time we will reflect FCEV truck costs in cost of revenues. We will continue to incur research and development for personnel and outside development.

Selling, General, and Administrative Expense

Selling, general, and administrative expenses consist of personnel related expenses for our corporate, executive, finance, and other administrative functions, expenses for outside professional services, including legal, audit and accounting services, as well as expenses for facilities, depreciation, amortization, travel, IT, and marketing costs. Personnel related expenses consist of salaries, benefits, and stock-based compensation.

We expect our selling, general, and administrative expenses to decline as we continue to stay focused on right-scaling the business and implement cost-cutting programs to enable cash preservation.

Loss on Supplier Deposits

Loss on supplier deposits consist of losses on deposits for tooling and long-term supply agreements.

Interest Expense, net

Interest expense consists of interest on our debt, financing obligation and finance lease liabilities. Interest income consists primarily of interest received or earned on our cash, cash equivalents and restricted cash and cash equivalents balances.

Revaluation of Warrant Liability

The revaluation of warrant liability includes net gains and losses from the remeasurement of the warrant liability. Warrants recorded as liabilities are recorded at their fair value and remeasured at each reporting period.

Gain on Divestiture of Affiliate

Gain on divestiture of affiliate consists of consideration for the divestiture of Nikola Iveco Europe GmbH and the related License Agreement, in excess of the basis of our investment as of the divestiture date.

Loss on Debt Extinguishment

Loss on debt extinguishment represents the loss on exchange of \$100.0 million of June 2022 Toggle Convertible Notes for the issuance of \$100.0 million April 2023 Toggle Convertible Notes. The loss was calculated as the difference between the carrying value of the June 2022 Toggle Convertible Notes exchanged and the fair value of the \$100.0 million April 2023 Toggle Convertible Notes issued as of the closing date of the exchange.

Other Income (Expense), net

Other income (expense), net consists primarily of other miscellaneous non-operating items, such as government grants, subsidies, merchandising, revaluation gains and losses on derivatives and other instruments recognized at fair value, foreign currency gains and losses, and unrealized gains and losses on investments.

Income Tax Expense

Our income tax provision consists of an estimate for U.S. federal and state income taxes based on enacted rates, as adjusted for allowable credits, deductions, uncertain tax positions, changes in deferred tax assets and liabilities, and changes in the tax law. Due to cumulative losses, we maintain a valuation allowance against our U.S. and state deferred tax assets.

Equity in Net Loss of Affiliates

Equity in net loss of affiliates consists of our portion of net gains and losses from equity method investments, primarily Nikola Iveco Europe GmbH through the date of divestiture.

Results of Continuing Operations

Comparison of Three Months Ended June 30, 2023 September 30, 2023 to Three Months Ended June 30, 2022 September 30, 2022

The following table sets forth our historical operating results from continuing operations for the periods indicated:

Revenues:	Revenues:	Three Months Ended June 30,			\$	%	Three Months Ended September 30,			\$	%
		2023		2022	Change	Change	2023		2022	Change	Change
		(in thousands, except share and per share data)							(in thousands, except share and per share data)		
Revenues:	Revenues:	Truck sales	\$ 12,006	\$ 17,383	\$ (5,377)	(31)%	Truck sales	\$ (2,368)	\$ 23,853	\$ (26,221)	(110)%
Service and other	Service and other	3,356	751	2,605	347%	Service and other	636	388	248	64%	
Total revenues	Total revenues	15,362	18,134	(2,772)	(15)%	Total revenues	(1,732)	24,241	(25,973)	(107)%	
Cost of revenues:	Cost of revenues:	Truck sales	40,203	46,781	(6,578)	(14)%	Truck sales	122,679	54,080	68,599	127%
Service and other	Service and other	2,790	610	2,180	357%	Service and other	1,092	330	762	231%	
Total cost of revenues	Total cost of revenues	42,993	47,391	(4,398)	(9)%	Total cost of revenues	123,771	54,410	69,361	127%	
Gross loss	Gross loss	(27,631)	(29,257)	1,626	(6)%	Gross loss	(125,503)	(30,169)	(95,334)	316%	
Operating expenses:	Operating expenses:	Research and development	64,514	63,106	1,408	2%	Research and development	41,966	66,683	(24,717)	(37)%
Selling, general, and administrative	Selling, general, and administrative	58,764	79,868	(21,104)	(26)%	Selling, general, and administrative	57,982	132,865	(74,883)	(56)%	
Loss on supplier deposits	Loss on supplier deposits	17,717	—	17,717	NM						
Total operating expenses	Total operating expenses	140,995	142,974	(1,979)	(1)%	Total operating expenses	100,664	199,548	(98,884)	(50)%	
Loss from operations	Loss from operations	(168,626)	(172,231)	3,605	(2)%	Loss from operations	(226,167)	(229,717)	3,550	(2)%	
Other income (expense):	Other income (expense):					Other income (expense):					
Interest expense, net	Interest expense, net	(8,749)	(2,808)	(5,941)	212%	Interest expense, net	(52,680)	(7,735)	(44,945)	581%	
Revaluation of warrant liability	Revaluation of warrant liability	41	3,341	(3,300)	(99)%	Revaluation of warrant liability	—	586	(586)	(100)%	

Gain on divestiture of affiliate	70,849	—	70,849	NM						
Loss on debt extinguishment	(20,362)	—	(20,362)	NM						
Other expense, net	Other expense, net	(5,546)	(27)	(5,519)	20441%	Other expense, net	(146,654)	2,617	(149,271)	(5704)%
Loss before income taxes and equity in net loss of affiliates	Loss before income taxes and equity in net loss of affiliates		39,332			Loss before income taxes and equity in net loss of affiliates			(191,252)	
Income tax expense	Income tax expense	—	2	(2)	NM	Income tax expense	1	1	—	NM
Loss before equity in net loss of affiliates	Loss before equity in net loss of affiliates	(132,393)	(171,725)	39,334	(23)%	Loss before equity in net loss of affiliates	(425,501)	(234,249)		82%
Equity in net loss of affiliates	Equity in net loss of affiliates	(7,617)	(1,270)	(6,347)	500%	Equity in net loss of affiliates	(425,502)	(234,250)	(191,252)	82%
Net loss from continuing operations	Net loss from continuing operations	\$ (140,010)	\$ (172,997)	\$ 32,987	(19)%	Net loss from continuing operations	\$ (425,764)	\$ (236,234)	\$ (189,530)	80%
Basic and diluted net loss per share:	Basic and diluted net loss per share:					Basic and diluted net loss per share:				
Net loss from continuing operations	Net loss from continuing operations	\$ (0.20)	\$ (0.41)	\$ 0.21	(51)%	Net loss from continuing operations	\$ (0.50)	\$ (0.54)	\$ 0.04	(7)%
Weighted-average shares outstanding, basic and diluted	Weighted-average shares outstanding, basic and diluted	708,692,817	425,323,391	283,369,426	67%	Weighted-average shares outstanding, basic and diluted	857,213,992	438,416,393	418,797,599	96%

Revenues

Truck sales

Revenues related to sales of Tre BEV trucks decreased by \$5.4 million, or 31%, from \$17.4 million during the three months ended June 30, 2022 to \$12.0 million during the three months ended June 30, 2023. The decrease was driven by a lower average selling price attributed to the hold on new BEV truck shipments in connection with the recall during the three months ended June 30, 2023, compared to third quarter of 2023. Additionally, during the three months ended June 30, 2022, increased rebate activity to dealers to incentivize sales to end customers and third quarter of 2023, we repurchased seven previously sold trucks as a decrease in the number of Tre BEVs sold. During the three months ended June 30, 2023 and 2022, we shipped 45 and 48 Tre BEV trucks, respectively, to our us cancelling dealer network agreements.

Service and other

Revenues related to service and other revenue increased by \$2.6 million, or 347%, from \$0.8 million during the three months ended June 30, 2022 to \$3.4 million during the three months ended June 30, 2023. The increase in service and other sales was primarily driven by deliveries sales of MCTs and other charging products to dealers and customers service parts.

Cost of Revenues

Truck sales

Cost of revenues related to truck sales decreased by \$6.6 million, or 14%, from \$46.8 million during the three months ended June 30, 2022 to \$40.2 million during the three months ended June 30, 2023. The increase is attributed to the voluntary recall of revenues include direct materials, freight and duties BEV trucks in the third quarter of 2023. As a result of the recall, we accrued \$61.8 million for transportation of purchased parts, manufacturing labor and overhead including Coolidge plant facility estimated recall campaign costs and depreciation, inventory write-downs reserved \$45.7 million for net realizable value BEV battery pack and obsolescence, other components deemed excess and reserves for estimated warranty expenses. Given our inventory is stated at net realizable value, which is currently lower than the actual cost, any overhead including freight is expensed in the period incurred as opposed to being capitalized into inventory.

With the start of production late in the first quarter of 2022, we experienced high fixed costs in the prior year due to low volumes produced and we relied on expedited air freight to meet production deadlines. During the three months ended June 30, 2023, freight and other overhead costs decreased as we mature our supply chain logistics.

Service and other

Cost of revenues related to service and other revenue increased by \$2.2 million, or 357%, from \$0.6 million during the three months ended June 30, 2022 to \$2.8 million during the three months ended June 30, 2023. The increase was primarily driven by direct materials, outsourced

services, and fulfillment costs related to sales of service parts.

Research and Development

Research and development expenses decreased by \$24.7 million, or 37.1%, from \$66.7 million during the three months ended September 30, 2022 to \$42.0 million during the three months ended September 30, 2023. The decrease was primarily due to lower spending on outside development, professional services, expensed components and tooling related to FCEV prototype builds of \$15.8 million, decreases in stock compensation of \$5.9 million, and a decrease in personnel costs of \$3.7 million.

Selling, General, and Administrative

Selling, general, and administrative expenses decreased by \$74.9 million, or 56.4%, from \$132.9 million during the three months ended September 30, 2022 to \$58.0 million during the three months ended September 30, 2023. The decrease was driven by a decrease in stock based compensation of \$77.9 million primarily due to the acceleration of stock compensation for the market based RSUs that were cancelled in the third quarter of 2022, a decrease in legal expenses of \$5.9 million primarily related to Mr. Milton's indemnification agreement, and a decrease in professional services of \$3.4 million. These decreases were partially offset by an increase in depreciation expense of \$9.2 million primarily related to the reassessment of useful lives for BEV demo trucks, and an increase in other general corporate expenses of \$3.2 million.

Interest Expense, net

Interest expense, net increased by \$44.9 million from \$7.7 million during the three months ended September 30, 2022 to \$52.7 million during the three months ended September 30, 2023. Interest expense increased due to interest on Toggle Convertible Notes of \$40.4 million, interest on our Senior Convertible Notes of \$6.6 million, and interest on our financing obligations of \$1.3 million, partially offset by a decrease of interest expense on our Collateralized Promissory Notes of \$0.3 million, and interest income earned on our cash, cash equivalents and restricted cash and cash equivalents balances.

Revaluation of Warrant Liability

The revaluation of warrant liability decreased \$0.6 million, from a \$0.6 million gain during the three months ended September 30, 2022 to zero during the three months ended September 30, 2023, resulting from changes in fair value of our warrant liability.

Other Income (Expense), net

Other income (expense), net decreased by \$149.3 million from \$2.6 million net income during the three months ended September 30, 2022 to \$146.7 million net expense during the three months ended September 30, 2023. The decrease is primarily related to incremental losses on the revaluation of the bifurcated embedded conversion features on our Toggle Convertible Notes of \$187.2 million, losses from foreign currency translation of \$1.6 million, and losses on disposals of assets of \$1.3 million. Decreases were partially offset by a gain on revaluation of contingent stock consideration of \$41.5 million.

Income Tax Expense

Income tax expense was immaterial for the three months ended September 30, 2023 and 2022. We have accumulated net operating losses at the federal and state level and maintain a full valuation allowance against our net deferred taxes.

Equity in Net Loss of Affiliates

Equity in net loss of affiliates decreased by \$1.7 million, from \$2.0 million for the three months ended September 30, 2022 to \$0.3 million for the three months ended September 30, 2023. The decrease was driven by the divestiture of Nikola Iveco Europe GmbH during the second quarter of 2023. Following the divestiture, we no longer recognize a portion of the joint venture's net gains or losses.

Comparison of Nine Months Ended September 30, 2023 to Nine Months Ended September 30, 2022

The following table sets forth our historical operating results for continuing operations for the periods indicated:

	Nine Months Ended September 30,		\$		%		
	2023		2022		Change		
	(dollar amounts in thousands)						
Revenues:							
Truck sales	\$ 19,693	\$ 41,236	\$ (21,543)		(52)%		
Service and other	4,614	3,026	1,588		52%		
Total revenues	24,307	44,262	(19,955)		(45)%		
Cost of revenues:							
Truck sales	195,902	100,861	95,041		94%		
Service and other	4,236	2,396	1,840		77%		
Total cost of revenues	200,138	103,257	96,881		94%		
Gross loss	(175,831)	(58,995)	(116,836)		198%		
Operating expenses:							
Research and development	168,286	204,346	(36,060)		(18)%		
Selling, general, and administrative	159,443	289,916	(130,473)		(45)%		
Loss on supplier deposits	18,433	—	18,433		NM		

Total operating expenses	346,162	494,262	(148,100)	(30)%
Loss from operations	(521,993)	(553,257)	31,264	(6)%
Other income (expense):				
Interest expense, net	(71,262)	(10,754)	(60,508)	563%
Revaluation of warrant liability	315	3,493	(3,178)	(91)%
Gain on divestiture of affiliate	70,849	—	70,849	NM
Loss on debt extinguishment	(20,362)	—	(20,362)	NM
Other income (expense), net	(152,284)	4,423	(156,707)	(3543)%
Loss before income taxes and equity in net loss of affiliates	(694,737)	(556,095)	(138,642)	25%
Income tax expense	1	3	(2)	NM
Loss before equity in net loss of affiliates	(694,738)	(556,098)	(138,640)	25%
Equity in net loss of affiliates	(16,287)	(6,074)	(10,213)	168%
Net loss from continuing operations	\$ (711,025)	\$ (562,172)	\$ (148,853)	26%
Basic and diluted net loss per share:				
Net loss from continuing operations	\$ (1.01)	\$ (1.32)	\$ 0.31	(23)%
Weighted-average shares outstanding, basic and diluted	706,325,212	426,382,736	279,942,476	66%

Revenues

Truck sales

Revenues related to sales of Tre BEV trucks decreased by \$21.5 million, or 52%, from \$41.2 million during the nine months ended September 30, 2022 to \$19.7 million during the nine months ended September 30, 2023. The decrease was primarily driven by a decrease in the number of trucks delivered, a decrease in average selling price and an increase of dealer rebate activity to facilitate sales to end customers. During the nine months ended September 30, 2023 and 2022, we shipped 79 and 111 Tre BEV trucks, respectively, to our dealer network. The decrease in trucks delivered was primarily due to the temporary hold on new BEV truck shipments in connection with the recall during the third quarter of 2023. Additionally, during the third quarter of 2023, we repurchased seven previously sold trucks as a result of us cancelling dealer agreements.

Service and other

Revenues related to service and other revenue increased by \$1.6 million, or 52%, from \$3.0 million during the nine months ended September 30, 2022 to \$4.6 million during the nine months ended September 30, 2023. The increase in service and other sales was driven by deliveries of MCTs, other charging products and service parts and labor.

Cost of Revenues

Truck sales

Cost of revenues related to truck sales increased by \$95.0 million, or 94%, from \$100.9 million during the nine months ended September 30, 2022 to \$195.9 million during the nine months ended September 30, 2023. The increase is attributed to the voluntary recall of BEV trucks in the third quarter of 2023, which we accrued \$61.8 million for estimated recall campaign costs, and reserved \$45.7 million for BEV battery pack and other BEV inventory components deemed excess and obsolete.

With the start of BEV production late in the first quarter of 2022, we relied on expedited air freight to meet production deadlines during the nine months ended September 30, 2022. We have experienced a decrease in freight during the nine months ended September 30, 2023, which coupled with the reduction in number of trucks delivered, partially offset the increases in cost of revenues due to the recall campaign.

Service and other

Cost of revenues related to service and other revenue increased by \$1.8 million, or 77%, from \$2.4 million during the nine months ended September 30, 2022 to \$4.2 million during the nine months ended September 30, 2023. The increase was primarily driven by direct materials, outsourced services, and fulfillment costs related to MCTs and other charging products, product deliveries and direct materials and labor related to service parts and labor.

Research and Development

Research and development expenses increased decreased by \$1.4 million \$36.1 million, or 17.6%, or 2.2%, from \$63.1 million from \$204.3 million during the three nine months ended June 30, 2022 September 30, 2022 to \$64.5 million \$168.3 million during the three nine months ended June 30, 2023 September 30, 2023. This decrease was primarily due to decreased spending on outside development, professional services, freight, tooling, and expensed components related to Tre BEV and FCEV prototype builds of \$36.7 million. Additional decreases were related to stock compensation for \$7.6 million, and travel for \$1.4 million. These decreases were partially offset by an increase in personnel costs of \$8.9 million \$6.3 million related to higher labor costs and severance costs incurred related to reorganization in June 2023, an increase in freight of \$0.5 million, and increases related to depreciation and occupancy costs related to equipment, software, and facilities dedicated to research and development activities. The increases were partially offset by decreased spending on outside development, professional services, expensed components and tooling related to Tre FCEV prototype builds of \$5.9 million, decreases in stock based compensation of \$2.0 million, and a decrease in travel expenses of \$0.5 million.2023.

Selling, General, and Administrative

Selling, general, and administrative expenses decreased by \$21.1 \$130.5 million, or 26.4% 45.0%, from \$79.9 million \$289.9 million during the three nine months ended June 30, 2022 September 30, 2022 to \$58.8 million \$159.4 million during the three nine months ended June 30, 2023 September 30, 2023. The decrease was driven by a decrease in stock

based compensation expense of \$27.1 \$135.0 million, which decreased primarily due to the acceleration of stock compensation cost related to for the market based RSUs that were cancelled in the third quarter of 2022, and a decrease in legal expenses of \$7.1 \$23.5 million, primarily related to Mr. Milton's indemnification agreement. These decreases were partially offset by an increase in personnel expense costs of \$7.9 \$14.1 million primarily related to higher labor costs and severance costs incurred related to reorganization in June 2023, an increase in professional services and additional depreciation expense of \$2.3 million \$10.8 million primarily related to the reassessment of useful lives for BEV demo trucks. Additional increases included costs related to occupancy, travel, public relations and an increase in other general corporate expenses of \$2.8 \$3.5 million.

Loss on Supplier Deposits

Loss on supplier deposits of \$17.7 million \$18.4 million during the three nine months ended June 30, 2023 September 30, 2023 was related to losses on deposits for certain tooling and long-term supply agreements.

Interest Expense, net

Interest expense, net increased by \$5.9 \$60.5 million from \$2.8 million during the three months ended June 30, 2022 to \$8.7 \$10.8 million during the three nine months ended June 30, 2023 September 30, 2022 to \$71.3 million during the nine months ended September 30, 2023. Interest expense increased due to an increase in interest on our Toggle Convertible Notes of \$5.4 \$52.5 million, an increase in interest on our 5% Senior Convertible Notes of \$1.9 \$11.7 million, an increase in interest on our financing obligations obligation of \$0.4 \$2.6 million, and an increase in interest on our Collateralized Promissory Notes of \$0.3 \$0.4 million, partially offset by an increase in interest income earned on our cash, cash equivalents and restricted cash and cash equivalents balances.

Revaluation of Warrant Liability

The revaluation of warrant liability decreased \$3.3 by \$3.2 million, from a \$3.3 \$3.5 million gain during the three nine months ended June 30, 2022 September 30, 2022 to a \$0.04 \$0.3 million gain during the three nine months ended June 30, 2023 September 30, 2023, resulting from changes in fair value of our warrant liability.

Gain on Divestiture of Affiliate

Gain on divestiture of affiliate was \$70.8 \$70.8 million for the three nine months ended June 30, 2023 September 30, 2023, representing the consideration for the divestiture of Nikola Iveco Europe GmbH and related License Agreement, in excess of the basis of our investment as of the divestiture date.

Loss on Debt Extinguishment

Loss on debt extinguishment was \$20.4 \$20.4 million for the three nine months ended June 30, 2023, representing the loss on exchange of \$100.0 million of June 2022 Toggle Convertible Notes for the issuance of \$100.0 million April 2023 Toggle Convertible Notes.

Other Income (Expense), net

Other income (expense), net decreased by \$5.5 million from \$0.03 million net expense during the three months ended June 30, 2022 to \$5.5 million net expense during the three months ended June 30, 2023. The decrease is primarily related to incremental losses on revaluation of derivative assets and liabilities of \$4.6 million, losses from foreign currency translation of \$3.3 million, and decreases in government grant income. Decreases were partially offset by a gain on revaluation of the contingent stock consideration of \$2.5 million.

Income Tax Expense

Income tax expense was immaterial for the three months ended June 30, 2023 and 2022. We have accumulated net operating losses at the federal and state level and maintain a full valuation allowance against our net deferred taxes.

Equity in Net Loss of Affiliates

Equity in net loss of affiliates increased by \$6.3 million, from \$1.3 million for the three months ended June 30, 2022 to \$7.6 million for the three months ended June 30, 2023. The increase was driven by additional losses in the current period related primarily to Nikola Iveco Europe GmbH through the divestiture date.

Comparison of Six Months Ended June 30, 2023 to Six Months Ended June 30, 2022

The following table sets forth our historical operating results for continuing operations for the periods indicated:

	Six Months Ended June 30,		\$		%		
	2023		2022		Change		
	(dollar amounts in thousands)						
Revenues:							
Truck sales	\$ 22,061	\$ 17,383	\$ 4,678		27%		
Service and other	3,978	2,638	1,340		51%		
Total revenues	26,039	20,021	6,018		30%		
Cost of revenues:							
Truck sales	73,223	46,781	26,442		57%		
Service and other	3,144	2,066	1,078		52%		
Total cost of revenues	76,367	48,847	27,520		56%		
Gross loss	(50,328)	(28,826)	(21,502)		75%		

Operating expenses:				
Research and development	126,320	137,663	(11,343)	(8)%
Selling, general, and administrative	101,461	157,051	(55,590)	(35)%
Loss on supplier deposits	17,717	—	17,717	NM
Total operating expenses	245,498	294,714	(49,216)	(17)%
Loss from operations	(295,826)	(323,540)	27,714	(9)%
Other income (expense):				
Interest expense, net	(18,582)	(3,019)	(15,563)	516%
Revaluation of warrant liability	315	2,907	(2,592)	(89)%
Gain on divestiture of affiliate	70,849	—	70,849	NM
Loss on debt extinguishment	(20,362)	—	(20,362)	NM
Other income (expense), net	(5,630)	1,806	(7,436)	(412)%
Loss before income taxes and equity in net loss of affiliates	(269,236)	(321,846)	52,610	(16)%
Income tax expense	—	2	(2)	NM
Loss before equity in net loss of affiliates	(269,236)	(321,848)	52,612	(16)%
Equity in net loss of affiliates	(16,025)	(4,090)	(11,935)	292%
Net loss from continuing operations	<u>\$ (285,261)</u>	<u>\$ (325,938)</u>	<u>\$ 40,677</u>	<u>(12)%</u>
Basic and diluted net loss per share:				
Net loss from continuing operations	\$ (0.45)	\$ (0.78)	\$ 0.33	(42)%
Weighted-average shares outstanding, basic and diluted	629,630,362	420,266,181	209,364,181	50%

Revenues

Truck sales

Revenues related to sales of Tre BEV trucks increased by \$4.7 million, or 27%, from \$17.4 million during the six months ended June 30, 2022 to \$22.1 million during the six months ended June 30, 2023. The increase was primarily driven by increased sales volumes due to the commencement of Tre BEV commercial production late in the first quarter of 2022, and partially offset by a decrease in average selling price and increased dealer rebate activity to facilitate sales to end customers. During the six months ended June 30, 2023 and 2022, we shipped 76 and 48 Tre BEV trucks, respectively, to our dealer network.

Service and other

Revenues related to service and other revenue increased by \$1.3 million, or 51%, from \$2.6 million during the six months ended June 30, 2022 to \$4.0 million during the six months ended June 30, 2023. The increase in service and other sales was driven by deliveries of MCTs, other charging products and service parts and labor.

Cost of Revenues

Truck sales

Cost of revenues related to truck sales increased by \$26.4 million, or 57%, from \$46.8 million during the six months ended June 30, 2022 to \$73.2 million during the six months ended June 30, 2023. Truck cost of revenues include direct materials, freight and duties for transportation of purchased parts, manufacturing labor and overhead including Coolidge plant facility costs and depreciation, inventory write-downs for net realizable value and obsolescence, and reserves for estimated warranty expenses. Given our inventory is stated at net realizable value, which is currently lower than the actual cost, any overhead including freight is expensed in the period incurred as opposed to being capitalized into inventory.

With the start of production late in the first quarter of 2022, we have experienced high fixed costs due to low volumes produced and have relied on expedited air freight to meet production deadlines.

Service and other

Cost of revenues related to service and other revenue increased by \$1.1 million, or 52%, from \$2.1 million during the six months ended June 30, 2022 to \$3.1 million during the six months ended June 30, 2023. The increase was primarily driven by direct materials, outsourced services, and fulfillment costs related to MCTs and other charging product deliveries and direct materials and labor related to service parts and labor.

Research and Development

Research and development expenses decreased by \$11.3 million, or 8.2%, from \$137.7 million during the six months ended June 30, 2022 to \$126.3 million during the six months ended June 30, 2023. This decrease was primarily due to decreased spend on outside development, professional services, freight, and expensed components related to Tre BEV and FCEV prototype builds of \$16.5 million. Additional decreases were driven by lower depreciation and occupancy costs of \$1.1 million related to equipment and software dedicated to research and development activities, as well as decreased costs of \$3.7 million in travel, professional services and stock compensation. These increases were partially offset by an increase in personnel costs of \$10.0 million related to higher labor costs and severance costs incurred related to reorganization in June 2023, and increases in tooling and fuel costs for prototype vehicles of \$0.1 million.

Selling, General, and Administrative

Selling, general, and administrative expenses decreased by \$55.6 million, or 35.4%, from \$157.1 million during the six months ended June 30, 2022 to \$101.5 million during the six months ended June 30, 2023. The decrease was driven by stock based compensation expense of \$57.2 million, which decreased primarily due to the market based RSUs that were cancelled in the third quarter of 2022 and a decrease in legal expenses of \$17.6 million, primarily related to Mr. Milton's indemnification agreement. Decreases were partially offset by increases in personnel costs of \$12.6 million related to higher labor costs and severance costs incurred related to reorganization in June 2023. Additional increases included costs related to professional services, occupancy, travel, public relations and other general corporate expenses of \$6.7 million.

Loss on Supplier Deposits

Loss on supplier deposits of \$17.7 million during the six months ended June 30, 2023 was related to losses on deposits for certain tooling and long-term supply agreements.

Interest Expense, net

Interest expense, net increased by \$15.6 million from \$3.0 million during the six months ended June 30, 2022 to \$18.6 million during the six months ended June 30, 2023. Interest expense increased due to interest on our Toggle Convertible Notes of \$12.1 million, interest on our 5% Senior Convertible Notes of \$5.1 million, interest on our financing obligation of \$1.3 million, and interest on our Collateralized Promissory Notes of \$0.8 million, partially offset by interest income earned on our cash, cash equivalents and restricted cash and cash equivalents balances.

Revaluation of Warrant Liability

The revaluation of warrant liability decreased by \$2.6 million, from a \$2.9 million gain during the six months ended June 30, 2022 to a \$0.3 million gain during the six months ended June 30, 2023 resulting from changes in fair value of our warrant liability.

Gain on Divestiture of Affiliate

Gain on divestiture of affiliate was \$70.8 million for the six months ended June 30, 2023, representing the consideration for the divestiture of Nikola Iveco Europe GmbH and related License Agreement, in excess of the basis of our investment as of the divestiture date.

Loss on Debt Extinguishment

Loss on debt extinguishment was \$20.4 million for the six months ended June 30, 2023 September 30, 2023, representing the loss on exchange of \$100.0 million of June 2022 Toggle Convertible Notes for the issuance of \$100.0 million April 2023 Toggle Convertible Notes.

Other Income (Expense), net

Other income (expense), net decreased by \$7.4 \$156.7 million from \$1.8 \$4.4 million net income during the six nine months ended June 30, 2022 September 30, 2022 to \$5.6 \$152.3 million net expense during the six nine months ended June 30, 2023 September 30, 2023. The decrease is primarily related to losses from foreign currency translation of \$5.3 million, incremental losses on revaluation of derivative assets and liabilities of \$5.1 \$192.0 million, losses from foreign currency translation of \$6.9 million, losses on sales of asset of \$1.4 million, and decreases of government grant income. Decreases were partially offset by a gain on revaluation of the contingent stock consideration of \$2.5 \$44.0 million.

Income Tax Expense

Income tax expense was immaterial for the six nine months ended June 30, 2023 September 30, 2023 and 2022. We have accumulated net operating losses at the federal and state level and maintain a full valuation allowance against our net deferred taxes.

Equity in Net Loss of Affiliates

Equity in net loss of affiliates increased by \$11.9 \$10.2 million, from \$4.1 \$6.1 million for the six nine months ended June 30, 2022 September 30, 2022 to \$16.0 \$16.3 million for the six nine months ended June 30, 2023 September 30, 2023. The increase was driven primarily by additional losses in the current period related to our equity method investments, including most significantly Nikola Iveco Europe GmbH through the divestiture date.

Non-GAAP Financial Measures

In addition to our results determined in accordance with GAAP, we believe the following non-GAAP measures are useful in evaluating operational performance. We use the following non-GAAP financial information to evaluate ongoing operations and for internal planning and forecasting purposes. We believe that non-GAAP financial information, when taken collectively, may be helpful to investors in assessing operating performance.

EBITDA and Adjusted EBITDA

"EBITDA" is defined as net loss from continuing operations before interest income or expense, income tax expense or benefit, and depreciation and amortization. "Adjusted EBITDA" is defined as EBITDA adjusted for stock-based compensation and other items determined by management. Adjusted EBITDA is intended as a supplemental measure of our performance that is neither required by, nor presented in accordance with, GAAP. We believe that the use of EBITDA and Adjusted EBITDA provides an additional tool for investors to use in evaluating ongoing operating results and trends and in comparing our financial measures with those of comparable companies, which may present similar non-GAAP financial measures to investors. However, you should be aware that when evaluating EBITDA and Adjusted EBITDA we may incur future expenses similar to those excluded when calculating these measures. In addition, our presentation of these measures should not be construed as an inference that our future results will be unaffected by unusual or non-recurring items. Our computation of Adjusted EBITDA may not be comparable to other similarly titled measures computed by other companies, because all companies may not calculate Adjusted EBITDA in the same fashion.

Because of these limitations, EBITDA and Adjusted EBITDA should not be considered in isolation or as a substitute for performance measures calculated in accordance with GAAP. We compensate for these limitations by relying primarily on our GAAP results and using EBITDA and Adjusted EBITDA on a supplemental basis. You should review the reconciliation of net loss to EBITDA and Adjusted EBITDA below and not rely on any single financial measure to evaluate our business.

The following table reconciles net loss from continuing operations to EBITDA and Adjusted EBITDA for the three and **six** nine months ended **June 30, 2023** **September 30, 2023** and 2022:

	Three Months Ended June 30,				Six Months Ended June 30,				Three Months Ended September 30,		Nine Months Ended September 30,	
	2023		2022		2023		2022		2023		2022	
	(in thousands)								(in thousands)			
Net loss from continuing operations	Net loss from continuing operations	\$ (140,010)	\$ (172,997)	\$ (285,261)	\$ (325,938)	Net loss from continuing operations	\$ (425,764)	\$ (236,234)	\$ (711,025)	\$ (562,172)		
Interest expense, net	Interest expense, net	8,749	2,808	18,582	3,019	Interest expense, net	52,680	7,735	71,262	10,754		
Income tax expense	Income tax expense	—	2	—	2	Income tax expense	1	1	1	3		
Depreciation and amortization	Depreciation and amortization	5,524	6,565	11,762	9,676	Depreciation and amortization	16,996	6,796	28,758	16,472		
EBITDA	EBITDA	(125,737)	(163,622)	(254,917)	(313,241)	EBITDA	(356,087)	(221,702)	(611,004)	(534,943)		
Stock-based compensation	Stock-based compensation	25,709	54,841	50,257	108,369	Stock-based compensation	18,659	102,845	68,916	211,214		
Loss on supplier deposits	Loss on supplier deposits	17,717	—	17,717	—	Loss on supplier deposits	716	—	18,433	—		
Gain on divestiture of affiliate	Gain on divestiture of affiliate	(70,849)	—	(70,849)	—	Gain on divestiture of affiliate	—	—	(70,849)	—		
Loss on debt extinguishment	Loss on debt extinguishment	20,362	—	20,362	—	Loss on debt extinguishment	—	—	20,362	—		
Revaluation of financial instruments	Revaluation of financial instruments	5,633	196	5,434	192	Revaluation of financial instruments	145,717	(286)	151,151	(94)		
Regulatory and legal matters ⁽¹⁾	Regulatory and legal matters ⁽¹⁾	2,097	12,970	3,240	27,092	Regulatory and legal matters ⁽¹⁾	2,432	11,227	5,673	38,319		
Adjusted EBITDA	Adjusted EBITDA	\$ (125,068)	\$ (95,615)	\$ (228,756)	\$ (177,588)	Adjusted EBITDA	\$ (188,563)	\$ (107,916)	\$ (417,318)	\$ (285,504)		

⁽¹⁾ Regulatory and legal matters include legal, advisory, and other professional service fees incurred in connection with the short-seller article from September 2020, and investigations and litigation related thereto.

Non-GAAP Net Loss and Non-GAAP Net Loss Per Share, Basic and Diluted

Non-GAAP net loss and non-GAAP net loss per share, basic and diluted are presented as supplemental measures of our performance. Non-GAAP net loss is defined as net loss from continuing operations, basic and diluted adjusted for stock compensation expense and other items determined by management. Non-GAAP net loss per share, basic and diluted, is defined as non-GAAP net loss divided by weighted average shares outstanding, basic and diluted.

	Three Months Ended June 30,				Six Months Ended June 30,				Three Months Ended September 30,		Nine Months Ended September 30,	
	2023		2022		2023		2022		2023		2022	
	(in thousands, except share and per share data)								(in thousands, except share and per share data)			
Net loss from continuing operations	Net loss from continuing operations	\$ (140,010)	\$ (172,997)	\$ (285,261)	\$ (325,938)	Net loss from continuing operations	\$ (425,764)	\$ (236,234)	\$ (711,025)	\$ (562,172)		
Stock-based compensation	Stock-based compensation	25,709	54,841	50,257	108,369	Stock-based compensation	18,659	102,845	68,916	211,214		
Loss on supplier deposits	Loss on supplier deposits	17,717	—	17,717	—	Loss on supplier deposits	716	—	18,433	—		
Gain on divestiture of affiliate	Gain on divestiture of affiliate	(70,849)	—	(70,849)	—	Gain on divestiture of affiliate	—	—	(70,849)	—		
Loss on debt extinguishment	Loss on debt extinguishment	20,362	—	20,362	—	Loss on debt extinguishment	—	—	20,362	—		

Revaluation of financial instruments	Revaluation of financial instruments	5,633	196	5,434	192	Revaluation of financial instruments	145,717	(286)	151,151	(94)
Regulatory and legal matters ⁽¹⁾	Regulatory and legal matters ⁽¹⁾	2,097	12,970	3,240	27,092	Regulatory and legal matters ⁽¹⁾	2,432	11,227	5,673	38,319
Non-GAAP net loss	Non-GAAP net loss	\$ (139,341)	\$ (104,990)	\$ (259,100)	\$ (190,285)	Non-GAAP net loss	\$ (258,240)	\$ (122,448)	\$ (517,339)	\$ (312,733)
Non-GAAP net loss per share, basic and diluted	Non-GAAP net loss per share, basic and diluted	\$ (0.20)	\$ (0.25)	\$ (0.41)	\$ (0.45)	Non-GAAP net loss per share, basic and diluted	\$ (0.30)	\$ (0.28)	\$ (0.73)	\$ (0.73)
Weighted average shares outstanding, basic and diluted	Weighted average shares outstanding, basic and diluted	708,692,817	425,323,391	629,630,362	420,266,181	Weighted average shares outstanding, basic and diluted	857,213,992	438,416,393	706,325,212	426,382,736

⁽¹⁾ Regulatory and legal matters include legal, advisory, and other professional service fees incurred in connection with the short-seller article from September 2020, and investigations and litigation related thereto.

Adjusted Free Cash Flow

We define "Adjusted free cash flow", a non-GAAP financial measure, as net cash flow from operating activities less purchases of property, plant and equipment. Adjusted free cash flow is intended as a supplemental measure of our performance that is neither required by, nor presented in accordance with, GAAP.

Our use of Adjusted free cash flow has limitations as an analytical tool and should not be considered in isolation or as a substitute for an analysis of our results under GAAP. First, Adjusted free cash flow is not a substitute for net cash flow from operating activities. Second, other companies may calculate Adjusted free cash flow or similarly titled non-GAAP financial measures differently or may use other measures to evaluate their performance, all of which could reduce the usefulness of Adjusted free cash flow as a tool for comparison. Additionally, the utility of Adjusted free cash flow is further limited as it does not reflect our future contractual commitments and does not represent the total increase or decrease in our cash balance for a given period. Because of these and other limitations, Adjusted free cash flow should be considered along with net cash flow from operating activities and other comparable financial measures prepared and presented in accordance with GAAP.

The following table presents a reconciliation of net cash flow from operating activities, the most directly comparable financial measure calculated in accordance with GAAP, to Adjusted free cash flow for each of the periods presented.

	Most comparable GAAP measure:	Three Months Ended June 30,				Six Months Ended June 30,				Three Months Ended September 30,		Nine Months Ended September 30,	
		2023		2022		2023		2022		2023		2022	
		(in thousands)								(in thousands)			
Most comparable GAAP measure:	Most comparable GAAP measure:	Net cash used for operating activities	Net cash used for operating activities	\$ (111,143)	\$ (142,488)	\$ (287,165)	\$ (273,811)	Net cash used for operating activities	\$ (91,259)	\$ (157,648)	\$ (378,424)	\$ (431,459)	
Net cash used for investing activities	(5,010)	(56,889)	(55,527)	(90,343)	Net cash used for investing activities	(115)	(79,600)	(55,642)	(169,943)				
Net cash provided by financing activities	208,222	343,483	324,138	371,137	Net cash provided by financing activities	188,119	111,814	512,257	482,951				
Non-GAAP measure:	Non-GAAP measure:	Net cash used for operating activities	Net cash used for operating activities	(111,143)	(142,488)	(287,165)	(273,811)	Net cash used for operating activities	(91,259)	(157,648)	(378,424)	(431,459)	

Purchases of property, plant and equipment	Purchases of property, plant and equipment	Purchases of property, plant and equipment
Adjusted free cash flow	Adjusted free cash flow	Adjusted free cash flow

Liquidity and Capital Resources

In accordance with the ASC 205-40, *Disclosure of Uncertainties about an Entity's Ability to Continue as a Going Concern*, ("ASC 205-40"), we have evaluated whether there are conditions and events, considered in the aggregate, that raise substantial doubt about our ability to continue as a going concern within one year after the date that the consolidated financial statements are issued.

As an early stage growth company, our ability to access capital is critical. Until we can generate sufficient revenue to cover our operating expenses, working capital and capital expenditures, we will need to raise additional capital. Additional stock financing may not be available on favorable terms and could be dilutive to current stockholders. Debt financing, if available, may involve restrictive covenants and dilutive financing instruments.

We intend to employ various strategies to obtain the required funding for future operations such as continuing to access capital through the Equity Distribution Agreement, our Second Tumim Purchase Agreement, and the securities purchase agreement for the sale of an additional principal amount of unsecured senior convertible notes. However, the ability to access the Equity Distribution Agreement and Second Tumim Purchase Agreement are dependent on our common stock trading volume and the market price of our common stock, and with respect to the Second Tumim Purchase Agreement, registration of additional shares.

If capital is not available to us when, and in the amounts needed, we could be required to delay, scale back, or abandon some or all of our operations and development programs, which would materially harm our business, financial condition and results of operations. The result of our ASC 205-40 analysis, due to uncertainties discussed above, is that there is substantial doubt about our ability to continue as a going concern through the next twelve months from the date of issuance of these consolidated financial statements.

Since inception, we financed our operations primarily from the sales of common stock, the Business Combination, redemption of warrants, and the issuance of debt. As of **June 30, 2023** **September 30, 2023**, our principal sources of liquidity were our cash and cash equivalents in the amount of **\$226.7** **\$362.9** million.

During 2021, we entered into a purchase agreement with Tumim (the "First Tumim Purchase Agreement") allowing us to issue shares of our common stock to Tumim for proceeds of up to \$300.0 million. During the **six** **nine** months ended **June 30, 2023** **September 30, 2023**, we sold 3,420,990 shares of common stock for proceeds of \$8.4 million, under the First Tumim Purchase Agreement. During the **three** and **six** **nine** months ended **June 30, 2022** **September 30, 2022**, we sold 13,604,600 and 17,248,244 shares of common stock respectively, for proceeds of \$96.3 million and \$123.7 million respectively, under the terms of the First Tumim Purchase Agreement. As of **June 30, 2023** **September 30, 2023** we sold in aggregate 34,882,732 shares of common stock to Tumim under the terms of the First Tumim Purchase Agreement for gross proceeds of \$295.9 million, excluding the 155,703 commitment shares issued to Tumim as consideration for its irrevocable commitment to purchase shares of our common stock under the First Tumim Purchase Agreement. The First Tumim Purchase Agreement was terminated in the first quarter of 2023.

Additionally, during 2021, we entered into a second common stock purchase agreement with Tumim (the "Second Tumim Purchase Agreement" and, together with the First Tumim Purchase Agreement, the "Tumim Purchase Agreements") allowing us to issue shares of our common stock to Tumim for proceeds of up to an additional \$300.0 million, provided that certain conditions have been met. As of **June 30, 2023** **September 30, 2023**, we sold to Tumim 28,790,787 shares of common stock for proceeds of \$59.2 million, excluding the 252,040 commitment shares issued to Tumim as a consideration for its irrevocable commitment to purchase shares of our common stock. As of **June 30, 2023**, the The Second Tumim Purchase Agreement has a remaining commitment was terminated in the third quarter of \$240.8 million; however, there are no shares remaining registered. 2023.

During the second quarter of 2022, we completed a private placement of \$200.0 million aggregate principal amount of the June 2022 Toggle Convertible Notes, which mature on May 31, 2026. Net proceeds from the issuance were \$183.2 million. The June 2022 Toggle Convertible Notes bear interest at 8.00% per annum, to the extent paid in cash ("Cash Interest"), and 11.00% per annum, to the extent paid in kind through the issuance of additional June 2022 Toggle Convertible Notes ("PIK Interest"). Interest is payable semi-annually in arrears on May 31 and November 30 of each year, beginning on November 30, 2022. We can elect to make any interest payment through Cash Interest, PIK Interest or any combination thereof.

The initial conversion rate is 114.3602 shares per \$1,000 principal amount of the June 2022 Toggle Convertible Notes, subject to customary anti-dilution adjustments in certain circumstances, which represented an initial conversion price of approximately \$8.74 per share. During the second quarter of 2023, we exchanged \$100.0 million of **June 2022** **Toggle Convertible Notes** for \$100.0 million principal amount of **April 2023** **Toggle Convertible Notes**. The initial conversion rate for the April 2023 Toggle Convertible Notes is 686.8132 shares per \$1,000 principal amount of the April 2023 Toggle Convertible Notes, subject to customary anti-dilution adjustments in certain circumstances, which represented an initial conversion price of approximately \$1.46 per share. During the third quarter of 2023, the April 2023 Toggle Convertible Notes were converted in full for the issuance of 72,458,789 shares of our common stock.

Prior to February 28, 2026, the June 2022 Toggle Convertible Notes and April 2023 Toggle Convertible Notes (collectively, the "Toggle Convertible Notes") will be convertible at the option of the holders only upon the occurrence of specified events and during certain periods, and will be convertible on or after February 28, 2026, at any time until the close of business on the second scheduled trading day immediately preceding the maturity date of the June 2022 Toggle Convertible Notes.

During the third quarter of 2022, we entered into an **equity distribution agreement** (the "Equity Distribution Agreement") pursuant to which we can issue and sell shares of our common stock with an aggregate maximum offering price of \$400.0 million. During the **three** and **six** **nine** months ended **June 30, 2023** **September 30, 2023**, we sold 22,007,305 27,662,880 and 39,027,563 66,690,443 shares of common stock, respectively, under our the Equity Distribution Agreement. During the **three** and **six** **nine** months ended **June 30, 2023** **September 30, 2023**,

2023, we received \$30.8 \$53.1 million and \$62.5 \$115.6 million, respectively, in net proceeds from the Equity Distribution Agreement after deduction of commissions and fees to the sales agent. As of September 30, 2023, we had approximately \$313.7 million remaining available under the Equity Distribution Agreement.

During the fourth quarter of 2022, we entered into a securities purchase agreement with an investor pursuant to which we can issue and sell up to \$125.0 million in initial principal amount of senior convertible notes (the "5% Senior Convertible First Purchase Agreement Notes") in a registered direct offering. We consummated an initial closing for the sale of \$50.0 million in aggregate principal amount of 5% Senior Convertible First Purchase Agreement Notes on December 30, 2022. During the six months ended June 30, 2023, we consummated additional closings of \$52.1 million in aggregate principal amount of 5% Senior Convertible First Purchase Agreement Notes. As of September 30, 2023, all of the First Purchase Agreement Notes had been converted into common stock.

During the third quarter of 2023, we entered into a securities purchase agreement with an investor pursuant to which we can issue and sell up to \$325.0 million in initial principal amount of senior convertible notes (the "Second Purchase Agreement Notes") in a registered direct offering. We consummated an initial closing for the sale of \$125.0 million in aggregate principal amount of Second Purchase Agreement Notes on August 21, 2023. Additionally, during the third quarter of 2023, we consummated an additional closing of \$40.0 million in aggregate principal amount of Second Purchase Agreement Notes. Each 5% Senior Convertible Second Purchase Agreement Note will accrue interest at a rate of 5% per annum, and will mature on the first anniversary of its date of issuance unless the maturity date is extended at the option of the noteholders in certain instances. As of September 30, 2023, \$32.4 million aggregate principal amount of Second Purchase Agreement Notes were outstanding. The amount of additional notes that may be issued pursuant to the Second Purchase Agreement is limited by Nasdaq rules limiting the number of shares of common stock issuable upon conversion of the notes and is less than the remaining notional capacity under the agreement.

At any time on or after January 9, 2023 August 21, 2023, all or any portion of the principal amount of each 5% Second Purchase Agreement Senior Convertible Note, plus accrued and unpaid interest, any make-whole amount and any late charges thereon (the "Conversion Amount"), is convertible, in whole or in part, at the noteholder's option, into shares of common stock.

At any time during an Event of Default Redemption Right Period (as defined in the 5% Senior Convertible Note), a noteholder may alternatively elect to convert all or any portion of the Senior Convertible Notes at an alternate conversion rate equal to the quotient of (i) 115% of the Conversion Amount divided by (ii) the Conversion Price. As of June 30, 2023, all 5% Senior Convertible Notes issued pursuant to the additional closing have been converted in full.

On April 4, 2023, we sold 29,910,715 shares of our common stock in an underwritten public offering (the "Public Offering") at an offering price of \$1.12 per share, for net proceeds of \$32.2 million after deducting underwriting discounts and commissions.

On March 29, 2023, we entered into a stock purchase agreement with an investor (the "Investor") pursuant to which the Investor agreed to purchase up to \$100.0 million of shares of our common stock in a registered direct offering (the "Direct

Offering"), with the actual amount of shares of common stock purchased in the Direct Offering reduced to the extent of the total number of shares sold on the Public Offering. The Direct Offering closed on April 11, 2023, and we sold 59,374,999 shares of common stock at the Public Offering price of \$1.12 per share to the Investor for net proceeds of \$63.2 million.

On August 3, 2023, we obtained stockholder approval to increase our authorized number of common stock from 800,000,000 to 1,600,000,000, providing us additional share availability, including to continue to utilize the financing sources discussed above. As of September 30, 2023, we had 473.1 million shares remaining available for issuance.

Short-Term Liquidity Requirements

As of June 30, 2023 September 30, 2023, our current assets were \$406.9 million \$470.7 million, consisting primarily of cash and cash equivalents of \$226.7 \$362.9 million and inventory of \$86.6 \$57.0 million, and our current liabilities were \$233.1 million \$293.1 million, primarily comprised of accrued expenses and accounts payables, which includes \$85.5 million related to the SEC settlement and \$62.0 million for warranty reserves related primarily to the BEV recall.

Our short term liquidity will be utilized to execute our business strategy over the next twelve month period including (i) distribution recall work and service servicing of the BEV truck, (ii) expanding and maintaining the Coolidge manufacturing facility, (iii) the roll-out of our initial energy infrastructure, and (iv) completing validation production, distribution, and on-road testing servicing of the FCEV truck and starting commercial production. truck. However, actual results could vary materially and negatively as a result of a number of factors, including:

- our ability to manage the costs of manufacturing and servicing the FCEV and BEV trucks; trucks and our ability to drive the cost down with our suppliers;
- the amount and timing of cash generated from sales of our FCEV and BEV trucks; trucks and hydrogen infrastructure, and our ability to offer our products and services at competitive prices;
- the costs of expanding and maintaining our manufacturing facility and equipment;
- our warranty claims experience should actual warranty claims differ significantly from estimates;
- our BEV truck recall campaign costs;
- the scope, progress, results, costs, timing and outcomes of our ongoing validation and demos of our FCEV trucks;
- the costs and timing of development and deployment of our hydrogen distribution dispensing and storage network;
- our ability to attract and retain strategic partners for development and deployment of our hydrogen distribution dispensing and storage network and the related costs and timing;
- the costs of maintaining, expanding and protecting our intellectual property portfolio, including potential litigation costs and liabilities;

- the costs of additional general and administrative personnel, including accounting and finance, legal and human resources, as well as costs related to litigation, investigations, or settlements;
- our ability to raise sufficient capital to finance our business, and
- other risks discussed in the section entitled "Risk Factors."

Long-Term Liquidity Requirements

Until we can generate sufficient revenue and positive gross margins to cover operating expenses, working capital and capital expenditures, we expect to fund cash needs through a combination of equity and debt financing, including lease securitization, strategic collaborations, and licensing arrangements. If we raise funds by issuing equity or equity-linked securities, dilution to stockholders may result. Any equity or equity-linked securities issued may also provide for rights, preferences or privileges senior to those of holders of our common stock. If we raise funds by issuing debt securities, these debt securities would have rights, preferences and privileges senior to those of holders of our common stock. The terms of debt securities or other debt financing agreements could impose significant restrictions on our operations and may require us to pledge certain assets. The credit market and financial services industry have in the past, and may in the future, experience periods of upheaval that could impact the availability and cost of equity and debt financing.

Since the date of our incorporation, we have not engaged in any off balance sheet arrangements, as defined in the rules and regulations of the SEC. For the three and six nine months ended June 30, 2023 September 30, 2023, there have been no other material changes to our significant contractual obligations as previously disclosed in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended.

Summary of Cash Flows

The following table provides a summary of cash flow data:

	Six Months Ended June 30,				Nine Months Ended September 30,			
	2023		2022		2023		2022	
	(in thousands)				(in thousands)			
Net cash used in operating activities	Net cash used in operating activities	\$ (287,165)	\$ (273,811)	Net cash used in operating activities	\$ (378,424)	\$ (431,459)	Net cash used in operating activities	\$ (378,424)
Net cash used in investing activities	Net cash used in investing activities	(55,527)	(90,343)	Net cash used in investing activities	(55,642)	(169,943)	Net cash used in investing activities	(55,642)
Net cash provided by financing activities	Net cash provided by financing activities	324,138	371,137	Net cash provided by financing activities	512,257	482,951	Net cash provided by financing activities	512,257

Cash Flows from Operating Activities

Our cash flows from operating activities are significantly affected by the growth of our business primarily related to manufacturing, research and development and selling, general and administrative activities. Our operating cash flows are also affected by our working capital needs to support growth in personnel related expenditures and fluctuations in accounts payable and other current assets and liabilities needs.

Net cash used in operating activities was \$287.2 million \$378.4 million for the six nine months ended June 30, 2023 September 30, 2023. The most significant component of our cash used during this period was net loss from continuing operations of \$285.3 \$711.0 million, which included \$195.1 million non-cash net losses on revaluation of financial instruments, gain on divestiture of affiliate of \$70.8 million, non-cash expenses of \$50.3 million \$68.9 million related to stock-based compensation, \$20.4 \$64.5 million loss on debt extinguishment, \$19.4 inventory write downs, \$72.8 million non-cash interest expense, \$17.7 million loss on supplier deposits, \$16.0 million equity in net loss affiliates, other non-cash charges of \$30.9 million \$43.7 million, and net cash outflows of \$85.7 million \$41.7 million from changes in operating assets and liabilities primarily driven by a decrease in accounts payable and accrued expenses and other current liabilities and an increase in prepaid expenses and other current assets, assets partially offset by a decrease in accounts receivable, net.

Net cash used in operating activities was \$273.8 million \$431.5 million for the six nine months ended June 30, 2022 September 30, 2022. The most significant component of our cash used during this period was a net loss of \$325.9 million \$562.2 million, which included non-cash expenses of \$108.4 million \$211.2 million related to stock-based compensation, \$10.9 \$16.6 million inventory write downs, \$9.7 million \$16.5 million in depreciation and amortization, other non-cash charges of \$7.0 \$15.3 million and net cash outflows of \$83.8 \$128.9 million from changes in operating assets and liabilities primarily driven by an increase in inventory and prepaid expenses accounts receivable, partially offset by an increase in accounts payable and other current assets, accrued expenses.

Cash Flows from Investing Activities

We continue to experience negative cash flows from investing activities as we expand our business and infrastructure. Cash flows from investing activities primarily relate to capital expenditures to support our growth. Net cash used in investing activities is expected to decline with the commencement of commercial production of the FCEV at our manufacturing facility in Coolidge, Arizona in the second half of the year. As of June 30, 2023 September 30, 2023, we anticipate our capital expenditures for the remainder of fiscal year 2023 to be approximately \$50.0 \$35.0 million, of which a significant portion is related to investments in supplier tooling, the build out of FCEV trucks and FCPM assembly lines in

Coolidge, Arizona, and the development of our hydrogen infrastructure network. Actual Actual capital expenditures will also be dependent on availability of capital, capital as well as third party lead times.

Net cash used in investing activities was **\$55.5 million** **\$55.6 million** for the **six nine** months ended **June 30, 2023** **September 30, 2023**, which was primarily due to **\$87.7** **\$108.4 million** in purchases of and deposits for capital equipment, costs of expansion of our facilities, and investments in our hydrogen infrastructure and **\$2.8** **\$3.0 million** in other investing outflows, partially offset by proceeds of **\$35.0 million** related to the divestiture of Nikola Iveco Europe GmbH, and proceeds of **\$20.7 million** related to the sale of assets.

Net cash used in investing activities was **\$90.3 million** **\$169.9 million** for the **six nine** months ended **June 30, 2022** **September 30, 2022**, which was primarily due to **\$67.3** **\$118.4 million** in purchases of and deposits for capital equipment, costs of expansion of our **Coolidge** manufacturing facility, and **supplier tooling and investments in our hydrogen infrastructure**, **\$23.0 million** **cash in** contribution to **Nikola Iveco Europe GmbH**.

investments in affiliates, **\$21.9 million** issuance of senior secured debt and prepaid acquisition-related consideration, and settlement of the second price differential related to WVR for **\$6.6 million**.

Cash Flows from Financing Activities

Net cash provided by financing activities was **\$324.1 million** **\$512.3 million** for the **six nine** months ended **June 30, 2023** **September 30, 2023**, which was due to **proceeds from the issuance of Senior Convertible Notes of \$217.1 million**, **proceeds from the issuance of common stock under the Equity Distribution Agreement of \$115.0 million**, **proceeds from the Tumim Purchase Agreements of approximately \$67.6 million**, **proceeds from the Direct Offering of \$63.8 million**, **proceeds from the issuance of common stock under the Equity Distribution Agreement of \$61.6 million**, **proceeds from the issuance of additional 5% Senior Convertible Notes of \$52.1** **\$63.5 million**, **proceeds from the issuance of financing obligations of \$49.6** **\$53.5 million**, **proceeds from the Public Offering of \$32.2 million**, partially offset by **other net finance charges of \$2.7** **\$36.7 million**.

Net cash provided by financing activities was **\$371.1** **\$483.0 million** for the **six nine** months ended **June 30, 2022** **September 30, 2022**, which was primarily due to **proceeds from the issuance of the June 2022 Toggle Convertible Notes, net of debt issuance costs, of \$183.5 million**, **proceeds from the Tumim Purchase Agreements of approximately \$123.7 million**, **proceeds from the issuance of common stock under the Equity Distribution Agreement of \$100.5 million**, **proceeds from the issuance of the Collateralized Note of \$50.0** **\$54.0 million**, **proceeds from the issuance of financing obligations of \$38.6** **\$44.0 million**, **proceeds from insurance premium financing of \$6.6 million**, and **proceeds from the exercise of stock options of \$0.6** **\$1.6 million**, offset by the repayment of our promissory note for **\$25.0** **\$28.1 million**, and other finance charges of **\$0.2** **\$2.9 million**.

Critical Accounting Policies and Estimates

Our discussion and analysis of our financial condition and results of operations are based upon our financial statements, which have been prepared in accordance with GAAP. These principles require us to make certain estimates and assumptions. These estimates and assumptions affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities, as of the balance sheet date, as well as reported amounts of revenue and expenses during the reporting period. Our most significant estimates and judgments involve valuation of our stock-based compensation, including the fair value of common stock and market-based restricted stock units, the valuation of warrant liabilities, derivative assets and liabilities, estimates related to our lease assumptions, **warranty and recall campaign reserves**, and revenue recognition, contingent liabilities, including litigation reserves, and inventory valuation. Management bases its estimates on historical experience and on various other assumptions believed to be reasonable, the results of which form the basis for making judgments about the carrying values of assets and liabilities. Actual results could differ from those estimates.

There have been no substantial changes to these estimates, or the policies related to them during the three and **six nine** months ended **June 30, 2023** **September 30, 2023**. For a full discussion of these estimates and policies, see "Critical Accounting Policies and Estimates" in Item 7 of our Annual Report on Form 10-K for the year ended December 31, 2022, as amended.

Recent Accounting Pronouncements

See Note 2 to our Unaudited Consolidated Financial Statements included elsewhere in this Quarterly Report on Form 10-Q for more information about recent accounting pronouncements, the timing of their adoption, and our assessment, to the extent we have made one, of their potential impact on our financial condition and our results of operations.

ITEM 3. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

We are exposed to a variety of market and other risks, including the effects of inflation and foreign currency exchange rates, as well as risks related to the availability of funding sources, hazard events, and specific asset risks.

Foreign Currency Risk

For the three months ended **June 30, 2023** **September 30, 2023** and 2022, we recorded a gain of **\$1.4** **\$1.9 million** and a gain of **\$3.0** **\$2.6 million**, respectively, for foreign currency translation. For the **six nine** months ended **June 30, 2023** **September 30, 2023** and 2022, we recorded a gain of **\$3.2** **\$5.1 million** and a gain of **\$3.9** **\$6.5 million**, respectively, for foreign currency translation.

ITEM 4. CONTROLS AND PROCEDURES

Evaluation of Disclosure Controls and Procedures

We maintain a system of disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) under the Securities Exchange Act of 1934 (the "Exchange Act")) designed to ensure that the information required to be disclosed by us in the reports that we file or submit under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the rules and forms of the SEC, and is accumulated and communicated to our management, including our Chief Executive Officer (our principal executive officer) and Chief Financial Officer (our principal financial officer), as appropriate, to allow timely decisions regarding required disclosure.

Our management, with the participation of our Chief Executive Officer and our Chief Financial Officer, has evaluated the effectiveness of our disclosure controls and procedures under the Exchange Act as of **June 30, 2023** **September 30, 2023**, the end of the period covered by this Quarterly Report on Form 10-Q. Based on such evaluation, our Chief Executive Officer and our Chief Financial Officer have concluded that, as of such date, our disclosure controls and procedures were not effective due to a material weakness in internal control over financial reporting, including a material weakness related to our information technology general controls ("ITGC") that was disclosed in our Annual Report on Form 10-K for the fiscal year ended December 31, 2022, as amended.

Additionally, the Company identified a material weakness in internal control over financial reporting in connection with the review of our unaudited consolidated financial statements for the three months ended September 30, 2023. A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting such

that it is reasonably possible that a material misstatement of the annual or interim financial statements will not be prevented or detected on a timely basis. The material weakness identified is a result of certain control deficiencies related to the precision of our review for the valuation and remeasurement of the embedded derivative liability of our Toggle Convertible Notes as of June 30, 2023 and September 30, 2023. In response to this material weakness, we intend to enhance the control execution to ensure the Company's review of the completeness of features included in valuations.

Ongoing Remediation of Previously Identified Material Weakness

With the oversight of senior management and our Audit Committee, we have identified controls and implementation of our remediation plan is underway to address the material weakness related to our ITGCs mentioned above. During the nine months ended September 30, 2023, we have completed the following remedial actions:

- performed a risk assessment over the IT system that supports our financial reporting processes;
- hired consultants and key personnel with internal control experience with our IT system to drive remediation efforts;
- designed, developed, and deployed an enhanced ITGC framework, including the implementation of systems and tools to enable the effectiveness and consistent execution of these controls; and
- developed a training program to address ITGCs and policies, including (i) educating control owners concerning the principles and requirements of each control, with a focus on those related to user access and change management over IT systems impacting financial reporting; (ii) developing and maintaining documentation of underlying ITGCs to promote knowledge transfer upon personnel and function changes; and (iii) implementing an IT

management review and testing plan to monitor ITGCs with a specific focus on systems supporting our financial reporting processes.

We intend to continue to strengthen the enhanced system capabilities and business processes to manage and monitor key elements of the control framework. This includes segregation of duties, elevated user access review, change management, user provisioning and deprovisioning, and user access reviews. We expect these efforts to be complete in the fourth quarter of 2023.

However, the ITGC material weakness will not be considered remediated until the applicable controls operate for a sufficient period of time and management has concluded, through testing that these controls are operating effectively. We expect that the remediation of this material weakness will be completed prior to the end of fiscal year 2023.

Changes in Internal Control over Financial Reporting

Except for the changes in connection with the new material weakness and our implementation of the remediation plans above, there were no changes in our internal control over financial reporting, as identified in connection with the evaluation required by Rule 13a-15(d) and Rule 15d-15(d) of the Exchange Act, that occurred during the three months ended June 30, 2023 September 30, 2023 that have materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

PART II - OTHER INFORMATION

ITEM 1. LEGAL PROCEEDINGS

For a description of our material pending legal proceedings, see Note 12, *Commitments and Contingencies*, to the consolidated financial statements included elsewhere in this Quarterly Report on Form 10-Q and to Note 14 to our audited consolidated financial statements in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, which are incorporated by reference herein.

ITEM 1A. RISK FACTORS

Risks Related to Our Business and Industry

We are an early stage company with a history of losses, expect to incur significant expenses and continuing losses for the foreseeable future, and there is a substantial doubt that we will have sufficient funds to satisfy our obligations through the next 12 months from the date of this report.

We incurred net losses of \$784.2 million, \$325.9 million and \$386.9 million for the year ended December 31, 2022 and for the six months ended June 30, 2022 September 30, 2022 and 2023, respectively, and have an accumulated deficit of approximately \$2.4 billion \$2.9 billion from the inception of Nikola Corporation, a Delaware corporation, prior to the merger with VectolQ, or Legacy Nikola, through June 30, 2023 September 30, 2023. We believe that we will continue to incur operating and net losses each quarter until at least the time we begin to generate significant margin from our trucks, which may not happen. We have determined under our ASC 205-40 analysis, there is a substantial doubt that we will have sufficient funds to satisfy our obligations through the next twelve months from the date of issuance of this Quarterly Report on Form 10-Q.

Our ability to continue as a going concern is dependent on our ability to obtain the necessary financing to meet our obligations and repay our liabilities arising from the ordinary course of business operations when they become due. The outcome of these matters cannot be predicted with any certainty at this time. If we are unable to raise sufficient capital when needed, our business, financial condition and results of operations will be materially and adversely affected, and we will need to significantly modify or terminate our operations and our planned business activities.

We have secured and intend to employ various strategies to obtain the required funding for future operations such as continuing to access capital through the amended and restated equity distribution agreement with Citigroup Global Markets Inc., as sales agent, the second common stock purchase agreement (the "Tumim Purchase Agreement") with Tumim Stone Capital LLC, and the securities purchase agreement with investors for the sale of an additional principal amount of unsecured senior convertible notes. agent. However, the ability to access the equity distribution agreement and second common stock purchase agreement are dependent on our common stock trading volumes and the market price of our common stock, which cannot be assured, and as a result cannot be included as sources of liquidity for our ASC 205-40 analysis.

Our potential future profitability is dependent upon the successful development and successful commercial introduction and acceptance of our trucks and our hydrogen station platform, which may not occur.

We expect the rate at which we will incur losses to be high in future periods as we:

- continue to validate and manufacture our trucks;
- continue to build out and equip our manufacturing plant in Arizona;
- build up inventories of materials and components for our trucks;
- manufacture an available inventory of our trucks;
- develop and deploy our hydrogen fueling stations;
- expand our design, development, maintenance and repair capabilities;
- increase our sales and marketing activities;
- develop our distribution infrastructure; and
- increase our general and administrative functions to support our growing operations.

Because we incur the costs and expenses from these efforts and other efforts before we receive any incremental revenue with respect thereto, if any, our losses in future periods will be significant. In addition, these efforts have and may continue to be more expensive than we currently anticipate and these efforts may not result in sufficient revenue if customers do not purchase or lease our trucks in sufficient volume, which would further increase our losses.

We may be unable to adequately control the costs associated with our operations.

We require significant capital to develop and grow our business. We expect to continue to incur significant expenses which will impact our profitability, including research and development expenses, raw material procurement costs, leases, licenses, and sales and distribution expenses as we build our brand and market our trucks, and potential FCEV bundled leases, and general and administrative expenses as we scale our operations. In addition, we expect to continue to incur significant costs in connection with our services, including building our hydrogen fueling stations and honoring our maintenance commitments under potential FCEV bundled lease packages. We may also incur significant costs related to the recall of our battery electric trucks. Our ability to become profitable in the future will not only depend on our ability to successfully market our vehicles and other products and services, but also to control our costs. If we are unable to cost-efficiently design, manufacture, market, sell, distribute and service our trucks and cost-efficiently develop our hydrogen fueling services, our margins, profitability and prospects would be materially and adversely affected.

Our business model has yet to be tested and any failure to commercialize our strategic plans would have an adverse effect on our operating results and business, harm our reputation and could result in substantial liabilities that exceed our resources.

Investors should be aware of the difficulties normally encountered by a new enterprise, many of which are beyond our control, including substantial risks and expenses in the course of establishing or entering new markets, organizing operations and undertaking successful marketing activities. The likelihood of our success must be considered in light of these risks, expenses, complications, delays and the competitive environment in which we operate. Our business plan may not be successful, and we may not be able to generate significant revenue, raise additional capital or operate profitably. We will continue to encounter risks and difficulties frequently experienced by early commercial stage companies, including scaling up our infrastructure and headcount, and may encounter unforeseen expenses, difficulties or delays in connection with our growth. In addition, as a result of the capital-intensive nature of our business, we expect to continue to sustain substantial operating expenses without generating sufficient revenue to cover expenditures. Any investment in our company is therefore highly speculative and could result in the loss of your entire investment.

Our limited operating history makes evaluating our business and future prospects difficult and may increase the risk of your investment.

You must consider the risks and difficulties we face as an early stage company with a limited operating history and a novel business plan. If we do not successfully address these risks, our business, prospects, operating results and financial condition will be materially and adversely harmed. We have a very limited operating history on which investors can base an evaluation of our business, operating results and prospects. We intend to derive substantially all of our revenue from the sale and lease of our vehicle platforms, which are still in the early stages of commercialization. Our revenue will also depend on the sale of hydrogen fuel at our planned hydrogen fueling stations which we do not expect to be operational until late 2023 or later. There are no assurances that we will be able to secure future business with the major trucking companies or with independent truck drivers.

It is difficult to predict our future revenue and appropriately budget for our expenses, and we have limited insight into trends that may emerge and affect our business. In the event that actual results differ from our estimates or we adjust our estimates in future periods, our operating results and financial position could be materially affected.

We need to raise additional capital, which may not be available to us when we need it. If we cannot raise additional capital when needed, our operations and prospects will be negatively affected.

The design, manufacture, lease, sale and servicing of vehicles and related hydrogen fueling stations. Our business is capital-intensive. We need to raise additional capital in the short- and long-term to operate our business, scale our manufacturing and roll out our hydrogen fueling stations, among other activities. We have and may continue to raise additional funds through the issuance of equity, equity related or debt securities, strategic partnerships, licensing arrangements, or through obtaining credit from government or financial institutions. This capital will be necessary to fund our ongoing operations, continue research, development and design efforts, improve infrastructure, introduce new vehicles, build hydrogen fueling stations and undertake other business activities. We cannot be certain that additional funds will be available to us on a timely basis, in the amounts needed, on reasonable terms, or terms favorable to us, or at all. If we raise funds by issuing equity or equity-linked securities, dilution to our stockholders could result. Any equity or equity-linked securities issued also may provide for rights, preferences or privileges senior to those of holders of our common stock. The terms of debt securities issued or borrowings, if available, could impose significant restrictions on our operations and may require us to pledge certain assets. If we raise funds through collaborations and licensing arrangements, we might be required to relinquish significant rights to our technologies or products, or grant licenses on terms that are not favorable to us.

If we cannot raise additional funds when we need them, we may have to significantly reduce our spending, delay or cancel our planned business activities or substantially change our corporate structure, and we may not have sufficient resources to conduct our business as planned. As a result, we may be forced to curtail or discontinue our operations, which could materially and adversely affect our financial condition, results of operations, business and prospects. In addition, sales of a substantial number of shares of our common stock in the public market or the perception that these sales might occur, including pursuant to our existing equity line of credit or our amended and restated equity distribution agreement, could depress the market price of our common stock and could impair our ability to raise capital through the sale of additional equity securities.

Our business model has yet to be tested and any failure to commercialize our strategic plans would have an adverse effect on our operating results and business, harm our reputation and could result in substantial liabilities that exceed our resources.

Investors should be aware of the difficulties normally encountered by a new enterprise, many of which are beyond our control, including substantial risks and expenses in the course of establishing or entering new markets, organizing operations and undertaking successful marketing activities. The likelihood of our success must be considered in light of these risks, expenses, complications, delays and the competitive environment in which we operate. Our business plan may not be successful, and we may not be able to generate significant revenue, raise sufficient capital or operate profitably. We will continue to encounter risks and difficulties frequently experienced by early commercial stage companies, including scaling up our infrastructure and headcount, and may encounter unforeseen expenses, difficulties or delays in connection with our growth. In addition, as a result of the capital-intensive nature of our business, we expect to continue to sustain substantial operating expenses without generating sufficient revenue to cover expenditures. Any investment in our company is therefore highly speculative and could result in the loss of your entire investment.

Our limited operating history makes evaluating our business and future prospects difficult and may increase the risk of your investment.

You must consider the risks and difficulties we face as an early stage company with a limited operating history and a novel business plan. If we do not successfully address these risks, our business, prospects, operating results and financial condition will be materially and adversely harmed. We have a very limited operating history on which investors can base an evaluation of our business, operating results and prospects. We intend to derive substantially all of our revenue from the sale and lease of our vehicle platforms, which are still in the early stages of commercialization. Our revenue will also depend on the sale of hydrogen fuel. There are no assurances that we will be able to secure future business with the major trucking companies or with independent truck drivers.

It is difficult to predict our future revenue and appropriately budget for our expenses, and we have limited insight into trends that may emerge and affect our business. In the event that actual results differ from our estimates or we adjust our estimates in future periods, our operating results and financial position could be materially affected.

Our future success is dependent upon the trucking industry's willingness to adopt FCEV and BEV trucks.

Our success is highly dependent upon the adoption by the trucking industry of hydrogen fuel cell and electric trucks. If the market for our FCEV and BEV trucks does not develop at the rate or to the extent that we expect, our business, prospects, financial condition and operating results will be harmed. The market for hydrogen fuel cell and electric trucks is new and untested and is characterized by rapidly changing technologies, price competition, numerous competitors or potential competitors, evolving government regulation and industry standards and uncertain customer demands and behaviors.

Factors that may influence the adoption of hydrogen fuel cell and electric vehicles include:

- perceptions about FCEV or BEV truck quality, safety, design, performance and cost, especially if adverse events or accidents occur that are linked to the quality or safety of hydrogen fuel cell or electric vehicles;
- perceptions about vehicle safety in general, including the use of advanced technology, such as vehicle electronics, hydrogen fueling and storage and regenerative braking systems;
- the decline of vehicle efficiency resulting from deterioration over time in the ability of the battery to hold a charge;
- the availability of charging infrastructure and associated costs;
- concerns about the availability of hydrogen stations, including those we plan to develop and deploy, which could impede our present efforts to promote FCEV trucks as a desirable alternative to diesel trucks;
- improvements in the fuel economy of internal combustion engines;
- the availability of service for hydrogen fuel cell or electric trucks;
- volatility in the cost of energy, oil, gasoline and hydrogen;
- government regulations and economic incentives promoting fuel efficiency and alternate forms of energy;
- the availability of tax and other governmental incentives to purchase and operate hydrogen fuel cell and electric trucks or future regulation requiring increased use of nonpolluting trucks;
- our ability to sell or lease trucks directly to businesses or customers dependent on state by state unique regulations and dealership laws;
- the availability of tax and other governmental incentives to sell hydrogen;
- perceptions about and the cost of hydrogen fuel cell; and
- macroeconomic factors.

Additionally, we may become subject to regulations that may require us to alter the design of our trucks, which could negatively impact customer interest in our products.

Further, we sell our trucks to dealers in our network and rely on the dealers to sell them to end users. We have experienced delays in receiving additional purchase orders from dealers due in part to the lack of availability of charging infrastructure. The end users of the Tre BEV will need to continually assess their charging capacity and may need to build additional infrastructure prior to ordering or receiving trucks from dealers. In addition, dealers have and may continue to experience delays in receiving proceeds from the California Hybrid Zero Emission Truck and Voucher Incentive Program ("HVIP"), the New York Truck Voucher Incentive Program ("NYTVIP"), and the New Jersey Zero-Emission Incentive Program ("NZIP") or other government incentive programs, for our BEV trucks, which many of our dealers are leveraging for the first time. To qualify for HVIP, NYTVIP or NZIP, dealers are required to complete extensive training, initiate and complete applications for each sales order, and complete the voucher redemption process upon delivery to the end-user. There can be no assurances that our BEV truck will continue to, or that our FCEV trucks will, qualify for these or other incentive programs, that our FCEV trucks, once in production, will qualify or that HVIP, NYTVIP and NZIP incentives will remain in effect. Any reduction, termination or failure to qualify for incentives, or any repeal of, or modification to, HVIP, NYTVIP or NZIP incentives, would result in increased prices for our trucks, which would harm our business.

If we fail to manage our future growth effectively, we may not be able to market and sell our vehicles successfully.

Any failure to manage our growth effectively could materially and adversely affect our business, prospects, operating results and financial condition. We intend to expand our operations significantly. Our future expansion is expected to include:

- forecasting production and revenue;
- controlling expenses and investments in anticipation of expanded operations;
- establishing or expanding validation, manufacturing, sales and service facilities;
- establishing our hydrogen fueling capabilities;
- implementing and enhancing administrative infrastructure, systems and processes; and
- hiring and training personnel, as production scales.

We may hire additional personnel as production scales, including manufacturing personnel and service technicians for our trucks. Because our trucks are based on a different technology platform than traditional internal combustion engines, individuals with sufficient training in alternative fuel and electric vehicles may not be available to hire, and as a result, we will need to expend significant time and expense training the employees we do hire.

We may offer a future bundled lease model that could present unique problems and may have an adverse effect on our operating results and business and harm our reputation.

We may offer a future bundled lease model, which may provide customers with the FCEV truck, hydrogen fuel and maintenance, and will be reliant on our ability to achieve a minimum hydrogen fuel efficiency in our FCEV trucks and hydrogen fuel cost. If we are unable to achieve or maintain this fuel efficiency or fuel cost, we may be forced to provide our bundled lease customers with fuel at prices below-cost or risk damaging our relationships with our customers. Any such scenario would put our bundled lease model in jeopardy and may have a material adverse effect on our business, prospects, operating results and financial condition.

We may face legal challenges in one or more states attempting to sell directly to customers, which could materially and adversely affect our costs.

Our business plan includes the direct sale of vehicles through our dealer network, and potentially, to individual customers. Most, if not all, states require a license to sell vehicles within the state. Many states prohibit manufacturers from directly selling vehicles to customers. In other states, manufacturers must operate a physical dealership within the state to deliver vehicles to customers. As a result, we may not be able to sell directly to customers in each state in the United States.

In many states, it is unclear if, as a manufacturer, we will be able to obtain permission to sell and deliver vehicles directly to customers. For customers located in states in which we are not allowed to sell or deliver vehicles, we may have to arrange alternate methods of delivery of vehicles. This could include delivering vehicles to adjacent or nearby states in which we are allowed to directly sell and ship vehicles, and arranging for the customer to transport the vehicles to their home states. These workarounds could add significant complexity and, as a result, costs, to our business.

We face risks and uncertainties related to litigation, regulatory actions and government investigations and inquiries.

We are subject to, and are, and may in the future become a party to, a variety of litigation, other claims, suits, regulatory actions and government investigations and inquiries. For example, in 2020, Nikola and our officers, directors and employees received subpoenas from the SEC related to aspects of our business as well as certain matters described in an article issued on September 10, 2020 published in September 2020 by a short-seller or the short-seller article. (the "short-seller article"). In addition, Nikola and Trevor R. Milton, our founder and former executive chairman, also received grand jury subpoenas from the U.S. Attorney's Office for the SDNY Southern District of New York (the "SDNY") and the N.Y. County District Attorney's Office. On July 29, 2021, the U.S. Attorney for the SDNY

announced the unsealing of a criminal indictment charging Mr. Milton with securities fraud and wire fraud, and the SEC announced charges against Mr. Milton for alleged violations of federal securities laws. On October 14, 2022, Mr. Milton was convicted of securities fraud and wire fraud.

We have cooperated, and will continue to cooperate, with these and other regulatory or governmental requests. We have incurred significant expenses as a result of the regulatory and legal matters relating to the short-seller article and Mr. Milton. The total cost associated with these matters will depend on many factors, including the duration of these matters and any related finding.

By order dated December 21, 2021, we and the SEC reached a settlement arising out of the SEC's investigation of Nikola. Under the terms of the settlement, without admitting or denying the SEC's findings, we agreed to cease and desist from future violations of the Exchange Act, and Rules 10b-5 and 13a-15(a) thereunder and Section 17(a) of the Securities Act of 1933 or the Securities Act; (the "Securities Act"), to certain voluntary undertakings; undertakings, and to pay a \$125 million civil penalty.

Additionally, six putative class action lawsuits were filed against us and certain of our current and former officers and directors, asserting violations of federal securities laws under Section 10(b) and Section 20(a) of the Exchange Act, and, in one case, violations of the Unfair Competition Law under California law, alleging that Nikola and certain of our officers and directors made false and/or misleading statements in press releases and public filings regarding our business plan and prospects. These lawsuits have been consolidated. Separately, three purported Nikola stockholder derivative actions were filed in the United States District Court, against certain of our current and former directors, alleging breaches of fiduciary duties, violations of Section 14(a) of the Exchange Act, and gross mismanagement, among other claims. We are unable to estimate the potential loss or range of loss, if any, associated with these lawsuits.

We are also subject to certain class action lawsuits and other litigation related to our acquisition of Romeo Power, Inc. ("Romeo"), our wholly-owned subsidiary that was in the business of manufacturing battery modules, packs, and battery management systems for commercial vehicle applications, in October 2022 of Romeo, and we also may be subject to unforeseen or additional expenditures, costs or liabilities, including costs and potential liabilities associated with litigation, investigations and regulatory actions related to Romeo. In addition, from time to time, we may also be involved in legal proceedings and investigations arising in the ordinary course of business, including those relating to employment matters, relationships with collaboration strategic partners, intellectual property disputes, and other business matters. Any such claims or investigations may be time-consuming, costly, divert management resources, or otherwise have a material adverse effect on our business or result of operations.

The results of litigation and other legal proceedings, including the other claims described under Note 12, *Commitments and Contingencies*, to the consolidated financial statements included elsewhere in this Quarterly Report on Form 10-Q and in Note 14, *Commitments and Contingencies*, in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, are inherently uncertain and adverse judgments or settlements in some or all of these legal disputes may result in materially adverse monetary damages or injunctive relief against us. Any claims or litigation, even if fully indemnified or insured, could damage our reputation and make it more difficult to compete effectively or obtain adequate insurance in the future. The litigation and other legal proceedings described under Note 12, *Commitments and Contingencies*, to the consolidated financial statements included elsewhere in this Quarterly Report on Form 10-Q and to Note 14, *Commitments and Contingencies*, in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, are subject to future developments and management's view of these matters may change in the future.

Product recalls have and may in the future materially and adversely affect our business, prospects, operating results and financial condition.

In 2022, we announced a recall related to the installation of the seat belt shoulder anchorage assembly, and in 2023, we announced a recall related to the towing pack brake module from a supplier.

In August 2023, we announced a voluntary recall of our BEV trucks as a result of the preliminary results of battery pack thermal event investigations. We filed a voluntary recall with the National Highway Traffic Safety Administration on August 15, 2023 and have placed a temporary hold on new BEV truck shipments.

The recall was initiated following a battery pack thermal event that was preliminarily determined to be caused by a defect within components of the existing battery pack. In investigating the root causes of the thermal event, it was discovered that additional process and design changes may be necessary and that cell-level issues may need to be addressed beyond the initially identified coolant manifold replacement. While the inquiries continue to identify the root causes of battery malfunctions, the battery packs in existing dealer and customer trucks will be retrofit with battery packs from an alternative supplier. The battery replacement is expected to commence in late 2023, with the first set of trucks expected to be returned to

customers starting in the first quarter of 2024, pending supply chain or other issues, including the need for additional changes to the recalled trucks. We are in the process of transporting all BEV trucks to our Coolidge manufacturing facility where the BEV trucks will be retrofit with battery packs of another supplier. There can be no guarantee as to when we will be able to repair the BEV trucks previously sold to our dealers and customer or our existing inventory of BEV trucks so that they may be sold or resume production of our BEV trucks. As of September 30, 2023, we accrued recall campaign costs of \$61.8 million for the recall of the BEV trucks that are expected to be returned to dealers and customers once the recall is complete, and reserved \$45.7 million for BEV battery pack and other components deemed excess and obsolete. If costs related to these events are higher than we expect, if it takes longer to repair affected trucks, if the needed repairs are more extensive than we currently anticipate, or if we are unable to sell our existing inventory or resume production of our BEV trucks on a timely basis, our business, results of operations and financial condition may be adversely impacted.

Recalls have and may in the future result in significant expenses and involve lawsuits and other regulatory actions, and diversion of management attention and other resources, any of which have and may in the future adversely affect our brand, business, results of operations, financial condition and cash flows.

In the future, we may voluntarily or involuntarily initiate a recall if any of our vehicles or electric powertrain components (including the fuel cell or batteries) prove to be defective or noncompliant with applicable federal motor vehicle safety standards. Such recalls involve significant expense and diversion of management attention and other resources, which could adversely affect our brand image in our target markets, as well as our business, prospects, financial condition and results of operations.

Our success will depend on our ability to economically manufacture our trucks at scale and build our establish hydrogen fueling stations ecosystem to meet our customers' business needs, and our ability to develop and manufacture trucks of sufficient quality and appeal to customers on schedule and at scale is unproven.

Our future business depends in large part on our ability to execute our plans to develop, manufacture, market and sell our FCEV and BEV trucks and to deploy the associated hydrogen fueling stations for our FCEV trucks at sufficient capacity to meet the transportation demands of our customers.

Our continued development of our truck platforms is and will be subject to risks, including with respect to:

- our ability to secure necessary funding;
- our ability to manufacture the vehicles within specified design tolerances;
- long-and short-term durability of our hydrogen fuel cell and electric drivetrain technology related components in the day-to-day wear and tear of the commercial trucking environment;
- compliance with environmental, workplace safety and other applicable regulations;
- securing necessary components on acceptable terms and in a timely manner;
- delays in delivery of final component designs to our suppliers;
- our ability to attract, recruit, hire and train skilled employees;
- quality controls;
- the effects of our recent recall of our BEV trucks, including costs associated with repairs, loss of revenue reputational harm and legal proceedings;
- delays or disruptions in our supply chain, including ongoing supply constraints and shortages; and
- other delays and cost overruns.

We have limited manufacturing experience and no experience to date in high volume manufacturing of our trucks. We do not know whether we will be able to develop efficient, automated, low-cost manufacturing capabilities and processes, and reliable sources of component supply, that will enable us to meet the quality, price, engineering, design and production standards, as well as the production volumes, required to successfully mass market our trucks. Even if we are successful in developing our high volume manufacturing capability and processes and reliably source our component supply, we do not know whether we will be able to do so in a manner that avoids significant delays and cost overruns, including as a result of factors beyond our control such as problems with suppliers and vendors, or in time to meet our vehicle commercialization schedules or to

satisfy the requirements of customers. Any failure to develop and maintain such manufacturing processes and capabilities within our projected costs and timelines could have a material adverse effect on our business, prospects, operating results and financial condition.

We may experience significant delays in the design, validation, manufacture, launch and financing of our trucks, including in the build out of our manufacturing plant, which could harm our business and prospects.

Any delay in the financing, design, validation, manufacture and launch of our trucks, including in the expansion of our manufacturing plant in Arizona, could materially damage our brand, business, prospects, financial condition and operating results. Vehicle manufacturers often experience delays in the design, validation, manufacture and commercial release of new products. To the extent we delay there are delays in the launch manufacturing of our FCEV trucks, our prospects could be adversely affected as we may fail to grow our market share. Furthermore, we rely on third party suppliers for the provision and development of many of the key components and materials used in our vehicles. To the extent our suppliers experience any delays in providing us with or developing necessary components, we could experience delays in delivering on our timelines.

Increases in costs, disruption of supply or shortage of raw materials, including lithium-ion battery cells, chipsets, and displays, and delays in the manufacturing and servicing of battery-packs for our BEV and FCEV trucks, following the assignment of Romeo, could harm our business.

We have and may continue to experience increases in the cost or a sustained interruption in the supply or shortage of raw materials and components, including battery cells and packs, semiconductors, and integrated circuits which primarily impact our infotainment system and controllers. Any such increase or supply interruption have and may in the future materially negatively impact our business, prospects, financial condition and operating results.

We use various raw materials including aluminum, steel, carbon fiber, non-ferrous metals (such as copper), and cobalt. The prices for these raw materials fluctuate depending on market conditions and global demand and could adversely affect our business and operating results. For instance, we are exposed to multiple risks relating to price fluctuations for lithium-ion cells. These risks include:

- disruption in the supply of cells due to quality issues or recalls by the battery cell manufacturers;
- an increase in the cost of raw materials, such as cobalt, used in lithium-ion cells; and
- the inability or unwillingness of current battery manufacturers to build or operate battery cell manufacturing plants to supply the numbers of lithium-ion cells required to support the growth of the electric vehicle industry as demand for such cells increases.

Any disruption in the supply of battery cells, semiconductors, or integrated circuits, has and may in the future, temporarily disrupt production of our BEV truck until a different supplier is fully qualified or supply from an existing supplier resumes. For example, we have historically relied on Romeo as a sole supplier limited number of suppliers of battery products. As a result of the Assignment in June 2023, we expect to manufacture and service battery packs that we have not manufactured or serviced before, or source from alternative manufacturers. The manufacturing process of battery products is complex, highly technical and can be subject to affected by supply chain disruptions and component shortages. Separately, as of August 2023, one of our battery suppliers is seeking to reorganize under Chapter 11 of the United States Bankruptcy Code. We expect to continue sourcing battery products from this supplier while they undergo reorganization. However, we are looking to source from alternative suppliers as well. Battery products are critical to our ability to manufacture and service our BEV and FCEV trucks in the quantities and on the timeframes we expect. If we cannot manufacture sufficient quantities of battery-packs or source sufficient quantities from alternative manufacturers, we may experience delays in the manufacturing or servicing of our BEV and FCEV trucks.

We rely on complex machinery for our operations and production involves a significant degree of risk and uncertainty in terms of operational performance and costs.

We rely on complex machinery for our operations and our production involves a significant degree of uncertainty and risk in terms of operational performance and costs. Our truck manufacturing plant consists of large-scale machinery combining many components. The manufacturing plant components are likely to suffer unexpected malfunctions from time to time and will depend on repairs and spare parts to resume operations, which may not be available when needed. Unexpected malfunctions of the manufacturing plant components may significantly affect the intended operational efficiency. Operational performance and costs can be difficult to predict and are often influenced by factors outside of our control, such as, but not limited to, scarcity of natural resources, environmental hazards and remediation, costs associated with decommissioning of machines, labor disputes and strikes, difficulty or delays in obtaining governmental permits, damages or defects in electronic systems, industrial accidents, fire, seismic activity and natural disasters. Should operational risks materialize, occur, they may result in the personal injury to or death of workers, the loss of production equipment, damage to manufacturing facilities, monetary losses, delays and unanticipated fluctuations in production, environmental damage, administrative fines, increased insurance costs and potential legal liabilities, all of which could have a material adverse effect on our business, results of operations, cash flows, financial condition or prospects.

If our manufacturing plant in Arizona becomes inoperable, we will be unable to produce our trucks and our business will be harmed.

We produce all of our trucks for North America at our manufacturing plant in Arizona. Our manufacturing plant and the equipment we use to manufacture our trucks would be costly to replace and could require substantial lead time to replace and qualify for use. Our manufacturing plant may be harmed or rendered inoperable by natural or man-made disasters, including earthquakes, flooding, fire, extreme temperatures and power outages, or by health epidemics, such as the COVID-19 pandemic, which may render it difficult or impossible for us to manufacture our trucks for some period of time. The inability to produce our trucks or the backlog that could develop if our manufacturing plant is inoperable for even a short period of time may result in the loss of customers or harm our reputation. Although we maintain insurance for damage to our property and the disruption of our business, this insurance may not be sufficient to cover all of our potential losses and may not continue to be available to us on acceptable terms, if at all.

Our plan to build a network of hydrogen fueling stations will require significant cash investments and management resources and may not meet our expectations with respect to additional sales of our FCEV trucks. In addition, we may not be able to open fueling stations in certain states.

Our plan to build a network of hydrogen fueling stations in the United States will require significant cash investments and management resources and may not meet our expectations with respect to sales of our FCEV trucks. This planned construction of hydrogen stations is essential to persuading customers to pay a higher premium for our trucks.

While we have constructed a demonstration station, it is operating at very limited capacity. In addition, we do not have experience in the actual provision of our refueling fueling solutions to users, and providing these services is subject to challenges, which include the logistics of rolling out our network of refueling fueling stations and teams in appropriate areas, inadequate capacity or over capacity in certain areas, security risks, risk of damage to vehicles during charging or refueling fueling and the potential for lack of customer acceptance of our services. We will need to ensure compliance with any regulatory requirements applicable in jurisdictions where our fueling stations will be located, including obtaining any required permits and land use rights, which could take considerable time and expense and is subject to the risk that government support in certain areas may be discontinued or subject to conditions that we may be unable to meet in a cost-efficient manner. In addition, given our lack of experience building and operating fueling stations, there could be unanticipated challenges which may hinder our ability to provide our proposed bundled lease fueling solutions to customers or make the provision of our

bundled leases fueling solutions costlier than anticipated. If we are unable to build and successfully operate, or experience delays in building or problems in operating, our network of hydrogen fueling stations, we may be unable to convince customers to buy or lease our FCEV trucks, or meet our fueling commitments under our bundled lease arrangements with customers, which may negatively impact our business, prospects, financial condition and operating results.

Our business may be subject to risks associated with construction, cost overruns and delays, and other contingencies that may arise while constructing or servicing a network of hydrogen fueling stations, and such risks may increase in the future as we expand the scope of such services.

We and our strategic partners expect to construct and service, or invest in the construction and servicing of, hydrogen fueling stations. We expect to undertake such construction or service with partners or contractors, which may require us and our partners to acquire or lease suitable land, obtain licenses or permits, that may require compliance with additional rules, working conditions, wage requirements and other union requirements, adding costs and complexity to a construction project. Additionally, we and our partners have limited experience in the engineering, procurement and construction of hydrogen fueling stations. If we and our partners are unable to provide timely, cost effective and quality construction-related services related to our hydrogen fueling stations, there could be material adverse effects on our business, prospects, financial condition and operating results.

In addition, we expect such construction and servicing to be subject to oversight and regulation in accordance with state and local laws and ordinances relating to building codes, accessibility requirements, safety, environmental protection and related matters, and to require various local and other governmental approvals and permits that may vary by jurisdiction. All of the above has and may continue to cause delays or cost-overruns or may prevent construction or servicing of hydrogen fueling stations. Meaningful delays or cost overruns, or the inability to construct or service hydrogen fueling stations, could have a material adverse effect on our business, prospects, financial condition and operating results.

While we or our partners construct hydrogen fueling stations, we plan to utilize mobile fueling stations at strategic locations to provide fueling needs to initial FCEV customers. However, these mobile fueling stations will also be subject to local laws and regulations, may not function as intended, may not produce sufficient quantity or be available at desired locations, in order to support the fueling needs of our customers.

We and our partners intend to rely on complex technology to dispense hydrogen at our planned network of hydrogen fueling stations, which involves a significant degree of risk and uncertainty in terms of operational performance and costs.

We and our strategic partners intend to rely on complex technology to dispense hydrogen at our planned network of hydrogen fueling stations. Hydrogen dispensing technology is in the early stages and involves a significant degree of uncertainty and risk in terms of operational performance and costs. The dispensing technology may suffer non-performance or unexpected malfunctions and will depend on repairs to resume operations, which could involve significant additional costs and may not be available or may not be available in a timely manner. Non-performance or unexpected malfunctions of the dispensing technology would significantly affect the intended operational efficiency of our hydrogen fueling stations. The inability of customers to procure hydrogen from our network of fueling stations due to non-performance or malfunctions of the dispensing technology would severely limit the use of our FCEV trucks and could have a material adverse effect on our business, prospects, financial condition or operating results.

We may not be able to produce or source the hydrogen needed to establish our planned hydrogen fueling stations, or may not be able to produce or source the hydrogen needed at competitive prices.

As a key component of our business model, we intend to establish a series of hydrogen fueling stations. Where electricity can be procured in a cost-effective manner, we expect that hydrogen fuel will be produced on-site, through electrolysis. In other cases, we expect that hydrogen fuel will be sourced by third-party providers or produced off-site and delivered to fueling stations under a stations. We have established hydrogen supply "hub and spoke" structure. In June 2021, we entered into a Hydrogen Sale and Purchase Agreement (the "Hydrogen Purchase Agreement") strategic partnerships intended to provide us with WVR to purchase hydrogen produced at the hydrogen production facility (the "Plant"), being developed by WVR in West Terre Haute, Indiana. WVR has yet to break ground on the Plant. There is no guarantee WVR will be able to meet its development timeline with regard to the facility or successfully produce hydrogen at scale. low carbon content hydrogen. To the extent we are unable to produce or obtain the source hydrogen, unable to produce or source hydrogen in sufficient volumes, or unable to obtain hydrogen at favorable prices, we may be unable to establish these fueling stations and severely limit the usefulness of our trucks, or, if we are still able to establish these stations, we may be forced to sell hydrogen at a loss in order to meet our commitments. We believe that this hydrogen incentive will be a significant driver for purchases or leases of our trucks, and therefore, the failure to establish and roll out these hydrogen fueling stations in accordance with our expectations would materially and adversely affect our business.

Our inability to cost-effectively source the energy requirements to conduct electrolysis at our fueling stations may impact the profitability of our proposed bundled leases by making our hydrogen uneconomical compared to other vehicle fuel sources.

Our ability to economically produce hydrogen for our FCEV trucks requires us to secure a reliable source of electricity for each of our proposed on-site gaseous stations and large scale production hubs at a price per kilowatt hour that is similar to wholesale rates in the geographic areas we target, and at vast quantities, assuming a full deployment of our planned hydrogen stations. During our initial hydrogen station roll-out, we intend to source power based on the most economical power mix available at each hydrogen production site, including power from the grid that is sourced from non-renewable sources. An increase in the price of energy used to generate hydrogen through electrolysis would likely result in a higher cost of fuel for our FCEV trucks as well as increase the cost of distribution, freight and delivery. We may not be able to offset these cost increases or pass such cost increases onto customers in the form of price increases, because of our contemplated bundled lease model for FCEV trucks, which could have an adverse impact on our results of operations and financial condition. In addition to the cost of electricity production, we expect to incur additional costs relating to the transmission, distribution, and storage of energy, among others.

Reservations for our trucks are cancellable.

Reservations for our FCEV trucks are subject to cancellation by the customer until the customer enters into a lease agreement or, in the case of Anheuser-Busch LLC ("AB"), to the extent our trucks do not meet the vehicle specifications and delivery timelines specified in the contract with AB, as discussed further below. Because all of our reservations are cancellable, it is possible that a significant number of customers who submitted reservations for our trucks may cancel those reservations.

Given the anticipated lead times between customer reservation and delivery of our trucks, there is a heightened risk that customers that have made reservations may not ultimately take delivery of vehicles due to potential changes in customer preferences, competitive developments and other factors. As a result, no assurance can be made that reservations will not be cancelled, or that reservations will ultimately result in the purchase or lease of a vehicle. Any cancellations could harm our financial condition, business, prospects and operating results.

While we currently have a contract with AB to lease up to 800 long-haul sleeper cab FCEV trucks, if we are unable to deliver our trucks according to the vehicle specifications and delivery timelines set forth in the contract, AB has the right to cancel its order for trucks. Moreover, the AB contract specifies lease terms and rental rates that may be difficult for us to meet depending on our ability to develop our trucks and hydrogen fueling network according to current design parameters and cost estimates. Any of these adverse events related to the AB order could harm our financial condition, business, prospects and operating results.

While we do not currently have any leasing arrangements finalized, in the future we may offer a bundled lease leasing options or other alternative structures to customers which would expose us to credit risk.

While we may offer **bundled leasing options** of our FCEV trucks or other alternative structures to potential customers through a third-party financing partner, we can provide no assurance that a third-party financing partner would be able or willing to provide the leasing services on terms that we have stated in our published materials, or to provide financing at all. Furthermore, offering a leasing alternative to customers will expose us to risks commonly associated with the extension of credit. Credit risk is the potential loss that may arise from any failure in the ability or willingness of the customer to fulfill their contractual obligations when they become due. Competitive pressure and challenging markets may increase credit risk through leases to financially weak customers, extended payment terms and leases into new and immature markets. This could have a material adverse effect on our business, prospects, financial results and results of operations.

We face significant barriers to produce our trucks, and if we cannot successfully overcome those barriers our business will be negatively impacted.

The trucking industry has traditionally been characterized by significant barriers to entry, including large capital requirements, investment costs of designing and manufacturing vehicles, long lead times to bring vehicles to market from the concept and design stage, the need for specialized design and development expertise, regulatory requirements, establishing a brand name and image and the need to establish sales, leasing, fueling and service locations. If we are not able to overcome these barriers, our business, prospects, operating results and financial condition will be negatively impacted and our ability to grow our business will be harmed.

If our trucks fail to perform as expected, our ability to develop, market and sell or lease our alternative fuel and electric trucks could be harmed.

Our trucks may contain defects in design and manufacture that may cause them not to perform as expected or may require repair. We currently have a limited frame of reference by which to evaluate the performance of our trucks upon which our business prospects depend. For example, our trucks use a substantial amount of software to operate which require modification and updates over the life of the vehicle. Software products are inherently complex and often contain defects and errors when first introduced. Our trucks also include components made by third parties. Such components have and may in the future contain defects, and require that we replace affected parts.

There can be no assurance that we will be able to detect and fix any defects in the trucks' hardware or software prior to commencing customer sales. We **have recently announced a recall of our BEV trucks** and may in the future experience recalls, **which could have and may continue to** adversely affect our brand in our target markets and could adversely affect our business, prospects and results of operations. Our trucks may not perform consistent with customers' expectations or consistent with other vehicles which may become available. Any **additional** product defects or any other failure of our trucks to perform as expected could harm our reputation and result in adverse publicity, lost revenue,

delivery delays, product recalls, product liability claims and significant warranty and other expenses, and could have a material adverse impact on our business, financial condition, operating results and prospects.

Product recalls could materially and adversely affect our business, prospects, operating results and financial condition.

In 2022, we announced a recall related to the installation of the seat belt shoulder anchorage assembly, and in 2023, we announced a recall related to the towing park brake module from a supplier. These recalls, and any recalls in the future may result in adverse publicity, damage our brand and materially and adversely affect our business, prospects, operating results, and financial condition. In the future, we may voluntarily or involuntarily initiate a recall if any of our vehicles or electric powertrain components (including the fuel cell or batteries) prove to be defective or noncompliant with applicable federal motor vehicle safety standards. Such recalls involve significant expense and diversion of management attention and other resources, which could adversely affect our brand image in our target markets, as well as our business, prospects, financial condition and results of operations.

Insufficient warranty reserves to cover warranty claims could materially and adversely affect our business prospects, financial condition and operating results.

We maintain warranty reserves to cover warranty-related claims. If our warranty reserves are inadequate to cover warranty claims on our vehicles, our business, prospects, financial condition and operating results could be materially and adversely affected. We may become subject to significant and unexpected warranty expenses. There can be no assurances that warranty reserves will be sufficient to cover all claims. **Additionally, future warranty reserves for our FCEV trucks may be significant due to parts that utilize new technology and have limited operating history and suppliers that may not warranty these parts.**

Although we have begun sales We face intense competition as a provider of BEV Class 8 trucks and hope to be among the first to bring FCEV Class 8 trucks, to market, competitors have and may continue to enter the market, which competition could have an adverse effect on our business.

We face intense competition in FCEV and BEV Class 8 trucks, including from companies in our target markets with greater financial resources, more extensive development, manufacturing, marketing and service capabilities, greater brand recognition and a larger number of managerial and technical personnel. If competitors' trucks are brought to market before our trucks, we may experience a reduction in potential market share.

Many of our current and potential competitors, particularly international competitors, have significantly greater financial, technical, manufacturing, marketing and other resources than we do and may be able to devote greater resources to the design, development, manufacturing, distribution, promotion, sale and support of their products.

We compete in a rapidly evolving and highly competitive industry, and a number of private and public companies have announced plans to offer or are offering FCEV and/or BEV trucks, including, but not limited to, companies such as Daimler, Volvo, Tesla, BYD, Peterbilt, XOS, Lion, Hyliion, Hyundai, Toyota, Navistar, Hino and Hyzon. Based on publicly available information, a number of these competitors have displayed prototype trucks and have announced target availability and production timelines, while others have launched pilot programs in some markets. In addition, we are aware that one potential competitor, BYD, is currently manufacturing and selling a Class 8 BEV truck. While some competitors may choose to offer BEV trucks, others such as Hyundai and Toyota have announced they plan to offer FCEV trucks and invest in hydrogen stations for refueling. In addition, our principal competition for our trucks will also come from manufacturers of trucks with internal combustion engines powered by diesel fuel.

We expect competition in our industry to intensify in the future in light of increased demand and regulatory push for alternative fuel and electric vehicles. We cannot provide assurances that our trucks will be among the first to market, or that competitors will not build hydrogen fueling stations. Even if our trucks are among the first to market,

we cannot assure you that customers will choose our vehicles over those of our competitors, or over diesel powered trucks.

Developments in alternative technology improvements in the internal combustion engine may adversely affect the demand for our trucks.

Significant developments in alternative technologies, such as advanced diesel, ethanol, or compressed natural gas or improvements in the fuel economy of the internal combustion engine, may materially and adversely affect our business and prospects in ways we do not currently anticipate. Other fuels or sources of energy may emerge as customers' preferred alternative to our truck platform. Any failure by us to develop new or enhanced technologies or processes, or to react to changes in existing technologies, could materially delay our development and introduction of new and enhanced alternative fuel and electric trucks, which could result in the loss of competitiveness of our trucks, decreased revenue and a loss of market share to competitors. Our research and development efforts may not be sufficient to adapt to changes in alternative fuel and electric vehicle technology. As technologies change, we plan to upgrade or adapt our trucks and introduce new models in order to continue to provide trucks with the latest technology, in particular battery cell technology.

We have limited experience servicing or repairing our vehicles. If we are unable to address the service requirements of our customers, our business will be materially and adversely affected.

Because we recently started commercial production, we have limited experience servicing or repairing our vehicles. Servicing alternative fuel and electric vehicles is different than servicing vehicles with internal combustion engines and requires specialized skills, including high voltage training and servicing techniques. We utilize our dealer network and may decide to partner with a third party to perform some or all of the maintenance on our trucks, and there can be no assurance that we will be able to enter into an acceptable arrangement with any such third-party provider. If we are unable to successfully address the service requirements of our customers, our business and prospects will be materially and adversely affected.

In addition, the motor vehicle industry laws in many states require that service facilities be available to service vehicles physically sold from locations in the state. While we anticipate developing a service program that would satisfy regulators in these circumstances, the specifics of our service program are still in development, and at some point may need to be restructured to comply with state law, which may impact our business, financial condition, operating results and prospects.

Collaboration with strategic partners is subject to risks.

We entered into the Hydrogen Purchase Agreement with WVR in June 2021, and we also acquired a 20% equity interest in WVR and entered into that certain Second Amended and Restated Limited Liability Company Agreement of WVR, pursuant to which, among other things, we, in our sole discretion, obtained the right (the "Offtake Right") to own up to 20% of the entity to which WVR will transfer ownership of the hydrogen gas turbine to be part of the Plant, without further consideration paid therefore, subject to certain conditions. Exercising this Offtake Right will likely require us to make significant capital expenditures to build liquefaction, storage, and transportation services. In addition, our expectations regarding the cost to us of hydrogen pursuant to the Offtake Right may be inaccurate, which could have a negative effect on our FCEV business, including future bundled lease options that we may offer.

We have entered into other collaborations and have announced planned collaborations with various parties, including with respect to hydrogen production and sourcing, providing service and maintenance and deployment of hydrogen fueling stations. Discussions with our strategic partners are ongoing, are a number of collaborations are subject to the parties' entry into definitive documentation, and terms of the agreements are subject to change. Consequently, there can be no assurance that we will enter into agreements on the terms initially contemplated, if at all, or that our agreements with our strategic partners will remain in place. We also recently announced plans that For example, we sold assets related to the development of a hydrogen production hub to FFI will acquire our Phoenix hydrogen hub project, in July 2023, and are working currently negotiating an arrangement with FFI on for a potential offtake of hydrogen supply agreement, produced at the hub.

Collaboration with third parties is subject to risks with respect to operations that are outside our control. We could experience delays if our partners do not meet agreed upon timelines or experience capacity constraints. There are risks of potential disputes, disagreements or fallout with partners and failure to perform under contracts or enforce contracts against the other party, and/or the potential terminations, or non-renewals, of such contracts, and the production of our trucks or supply of hydrogen could be disrupted as a result. We may not be able to realize business or financial benefits of our strategic collaborations. We could be affected by adverse publicity related to our partners, whether or not such publicity is related to their collaboration with us, or adverse publicity related to our relationships with our partners. Our ability to successfully build a premium brand could also be adversely affected by perceptions about the quality of our partners' products or by the termination of our agreements with our partners. In addition, in situations where we rely on our partners and third parties to meet our quality standards, there can be no assurance that we will successfully maintain quality standards. In addition, our share of the earnings or losses of a collaborator may adversely affect our financial results, depending on the nature of the collaboration, including the discontinuation thereof.

We may be unable to enter into new agreements or extend existing agreements with strategic partners on terms and conditions acceptable to us and therefore may need to contract with other third parties or significantly add to our own production capacity. There can be no assurance that in such event we would be able to engage other third parties or establish or expand our own production capacity to meet our needs on acceptable terms or at all. The expense and time required to complete any transition, and to assure that vehicles manufactured at facilities of new manufacturers comply with our quality standards and regulatory requirements, may be greater than anticipated. Any of the foregoing could adversely affect our business, results of operations, financial condition and prospects.

We are or may be subject to risks associated with strategic alliances or acquisitions.

We have entered into, and may in the future enter into additional, strategic alliances, including joint ventures or equity investments with various third parties to further our business purpose. These alliances subject us to a number of risks, including risks associated with sharing proprietary information, non-performance by the third party and increased expenses in establishing new, or maintaining current, strategic alliances, any of which may materially and adversely affect our business. We may have limited ability to monitor or control the actions of these third parties and, to the extent any of these strategic third parties suffers negative publicity or harm to their reputation from events relating to their business, we may also suffer negative publicity or harm to our reputation by virtue of our association with any such third party.

When appropriate opportunities arise, we may seek to acquire additional assets, products, technologies or businesses that are complementary to our existing business. We are subject to risks associated with such

If we make any acquisitions, including but not limited to the following, any of which could adversely affect our revenue, gross margin, profitability and financial results:

- In addition to possible stockholder approval, we may need approvals and licenses from relevant government authorities for the acquisitions and to comply with any applicable laws and regulations, which could result in increased delay and costs. Acquisitions and the subsequent integration of new assets and businesses into our own require significant attention from our management and could result in a diversion of resources from our existing business.

- Acquired assets or businesses may not generate the financial results we expect, within the expected timeframe or at all.
- Acquisitions could result in the use of substantial amounts of cash, potentially dilutive issuances of equity securities, the occurrence of significant goodwill impairment charges, amortization expenses for other intangible assets and exposure to potential unknown liabilities of the acquired business.
- The costs of identifying and consummating acquisitions may be significant.
- Our ability to conduct due diligence, and our ability to evaluate the results of such due diligence, is dependent upon the veracity and completeness of statements and disclosures made or actions taken by third parties or their representatives.
- Our due diligence process may fail to identify significant issues with the acquired company's products or financial disclosures.
- We may not be able to meet contractual obligations integrate these acquisitions successfully into our existing business, and we could assume unknown or contingent liabilities. Any future acquisitions by us also could result in significant write-offs or the incurrence of debt and contingent liabilities, any of which could harm our operating results. Integration of an acquired company also may require management resources that otherwise would be available for ongoing development of our existing business. We may not identify or complete these transactions in a timely manner, on a cost-effective basis, or at all, and we may not realize the anticipated benefits of any acquisition.

To finance any acquisitions, we may choose to issue shares of our common stock as consideration, which would dilute the ownership of our stockholders. In addition, it may be necessary for us to raise additional funds for acquisitions through public or private financings. Additional funds may not be available on terms that are favorable to us, or at all.

We acquired entity.

Romeo in October 2022. On June 30, 2023, pursuant to a general assignment (the "Assignment"), Romeo transferred ownership of all of Romeo's right, title and interest in and to all of its tangible and intangible assets, subject to certain agreed upon exclusions (collectively, the "Assets") to SG Service Co., LLC, in its sole and limited capacity as Assignee for the Benefit of Creditors of Romeo ("Assignee"), and also designated Assignee to act as the assignee for the benefit of creditors of Romeo, such that, as of June 30, 2023, Assignee succeeded to all of Romeo's right, title and interest in and to the Assets.

We have incurred losses as a result of the Assignment. For example, we recognized a loss of \$24.9 million which is recorded in loss from deconsolidation of discontinued operations in the consolidated statements of operations for the three and six nine

months ended June 30, 2023 September 30, 2023. The carrying values of the assets and liabilities of Romeo were removed from the Company's consolidated balance sheets as of June 30, 2023. See Note 10, *Deconsolidation of Subsidiary*, to the consolidated financial statements included elsewhere in this Quarterly Report on Form 10-Q for additional information.

We are currently subject to ongoing litigation related to, among other things, our acquisition of Romeo, and may in the future be subject to additional litigation, litigation related to Romeo. While we understand that the Assignee is in the process of winding down operations of Romeo, the commencement of the Assignment will does not have the benefit effect of staying pending such litigation. Litigation and the time, cost and expenses associated with it could negatively impact our financial condition and results of operations.

We are dependent on our suppliers, a significant number of which are single or limited source suppliers, and the inability of these suppliers to deliver necessary components of our vehicles at prices and volumes acceptable to us would have a material adverse effect on our business, prospects and operating results.

While we seek to obtain components from multiple sources whenever possible, many of the components used in our vehicles are or will be purchased by us from a single source, especially with respect to hydrogen fuel cells and batteries. We refer to these component suppliers as our single source suppliers. For example, we entered into an agreement with Robert Bosch LLC ("Bosch"), whereby we committed to purchase certain component requirements for fuel cell power modules from Bosch beginning on June 1, 2023 until December 31, 2030. While we believe that we may be able to establish alternate supply relationships and can obtain or engineer replacement components for our single source components, we may be unable to do so in the short term (or at all) at prices or quality levels that are favorable to us or that meet our requirements.

A significant benefit of our collaborations with manufacturing partners is the ability to leverage their respective existing assortment of parts, thereby decreasing our purchasing expenses. While these relationships give us access to use an existing supplier base with the hopes of accelerating procurement of components at favorable prices, there is no guarantee that this will be the case. In addition, we have and may in the future experience delays if our suppliers do not meet agreed upon timelines or experience capacity constraints.

Our vehicles' anticipated range may not be achievable based on various external conditions, which may negatively influence potential customers' decisions whether to purchase or lease our trucks.

We anticipate the range of our Tre FCEV and Tre BEV vehicles to be up to 500 and 330 miles, respectively, before needing to recharge or refuel, depending on the type of vehicle. Actual range varies with conditions such as external environment, average speed, number of stops, grade of routes, gross combined weight, trailer type, and driver behavior, among others. Range specifications are subject to change. The perceived lack of sufficient range may negatively affect potential customers' decisions to buy or lease our trucks.

The battery efficiency of electric trucks and fuel cell efficiency of FCEV trucks will decline over time, which may negatively influence potential customers' decisions whether to purchase our trucks.

Our vehicles' range will decline over time as the battery or fuel cell, as applicable, deteriorates. Other factors such as usage, time and stress patterns may also impact the ability to hold a charge, which would decrease our trucks' range. Such deterioration and the related decrease in range may negatively influence potential customer decisions to purchase our trucks.

Our trucks make use of lithium-ion battery cells, which have been observed to catch fire or vent smoke and flame.

The battery packs within our trucks make use of lithium-ion cells. On rare occasions, lithium-ion **Lithium-ion** cells can rapidly release the energy they contain by venting smoke and flames in a manner that can ignite nearby materials as well as other lithium-ion cells. While the battery pack is designed to contain any single cell's release of energy without spreading to neighboring cells, a fire or testing failure of our vehicles or other battery packs that we produce could occur, which could subject us to lawsuits, product recalls, or redesign efforts, all of which would be time consuming and expensive. For example, we recently announced a recall of our BEV trucks as a result of preliminary results of our battery pack thermal event investigation. The investigation was in response to a thermal event caused by a battery pack defect. Subsequent thermal events have also occurred. Also, negative public perceptions regarding the suitability of lithium-ion cells for automotive applications or any future incident involving lithium-ion cells, such as a vehicle or other fire, even if such incident does not involve our trucks, could seriously harm our business and prospects.

In addition, we store a significant number of lithium-ion cells at our facility. Any mishandling of battery cells may cause disruption to the operation of our facility. While we have implemented safety procedures related to the handling of the cells, a safety issue or fire related to the cells could disrupt our operations. Such damage or injury could lead to adverse publicity and potentially a safety recall. Moreover, any failure of a competitor's electric vehicle or energy storage product may cause indirect adverse publicity for us and our products. Such adverse publicity could negatively affect our brand and harm our business, prospects, financial condition and operating results.

We may face challenges related to perceptions of safety for commercial electric vehicles, especially if adverse events or accidents occur that are linked to the quality or safety of commercial electric vehicles.

An accident or safety incident involving one of our trucks may expose us to significant liability and a public perception that our trucks are unsafe or unreliable. For example, in June 2023, a fire started in one of our BEV trucks at our headquarters,

which spread to other trucks parked nearby. As a result of the fire, all of the trucks affected **are inoperable**. We **became inoperable**, and subsequent fires have **ongoing investigations to understand the cause of the fire** occurred. Any accident or safety incident involving one of our trucks, even if fully insured, could harm our reputation and result in a loss of future customer demand if it creates a public perception that our trucks are unsafe or unreliable as compared to those offered by other manufacturers or other means of transportation. As a result, any accident or safety incident involving our trucks, or commercial electric vehicles of our competitors could materially and adversely affect our business, prospects, financial condition, and operating results.

Any unauthorized control or manipulation of our vehicles' systems could result in loss of confidence in us and our vehicles and harm our business.

Our trucks contain complex information technology systems and built-in data connectivity to accept and install periodic remote updates to improve or update functionality. We have designed, implemented and tested security measures intended to prevent unauthorized access to our information technology networks, our trucks and related systems. However, bad actors may attempt to gain unauthorized access to modify, alter and use such networks, trucks and systems to gain control of or to change our trucks' functionality, user interface and performance characteristics, or to gain access to data stored in or generated by the truck. Future vulnerabilities could be identified and our efforts to remediate such vulnerabilities may not be successful. Any unauthorized access to or control of our trucks or their systems, or any loss of customer data, could result in legal claims or proceedings. In addition, regardless of their veracity, reports of unauthorized access to our trucks, systems or data, as well as other factors that may result in the perception that our trucks, systems or data are capable of being hacked could negatively affect our brand and harm our business, prospects, financial condition and operating results.

Interruption or failure of our information technology and communications systems could impact our ability to effectively provide our services.

We outfit our trucks with in-vehicle services and functionality that utilize data connectivity to monitor performance and timely capture opportunities for cost-saving preventative maintenance. The availability and effectiveness of our services depend on the continued operation of information technology and communications systems. Our systems may be vulnerable to damage or interruption from, among others, fire, terrorist attacks, natural disasters, power loss, telecommunications failures, computer viruses, computer denial of service attacks or other attempts to harm our systems. Our data centers could also be subject to break-ins, sabotage and intentional acts of vandalism causing potential disruptions. Some of our systems are not fully redundant, and our disaster recovery planning cannot account for all eventualities. Any problems at our data centers could result in lengthy interruptions in our service. In addition, our trucks are highly technical and complex and may contain errors or vulnerabilities, which could result in interruptions in our business or the failure of our systems.

We are subject to substantial regulation and unfavorable changes to, or failure by us to comply with, these regulations could substantially harm our business and operating results.

Our alternative fuel and electric trucks, and the sale and servicing of motor vehicles in general, are subject to substantial regulation under international, federal, state, and local laws. We have and expect to continue to incur significant costs in complying with these regulations. Regulations related to the electric vehicle industry and alternative energy are currently evolving and we face risks associated with changes to these regulations, including but not limited to:

- increased subsidies for corn and ethanol production, which could reduce the operating cost of vehicles that use ethanol or a combination of ethanol and gasoline; and
- increased sensitivity by regulators to the needs of established automobile manufacturers with large employment bases, high fixed costs and business models based on the internal combustion engine, which could lead them to

pass regulations that could reduce the compliance costs of such established manufacturers or mitigate the effects of government efforts to promote alternative fuel vehicles.

To the extent the laws change, our trucks may not comply with applicable international, federal, state or local laws, which would have an adverse effect on our business. Compliance with changing regulations could be burdensome, time consuming, and expensive. To the extent compliance with new regulations is cost prohibitive, our business, prospects, financial condition and operating results would be adversely affected.

We are subject to various environmental laws and regulations that could impose substantial costs upon us and cause delays in building our manufacturing facilities.

Our operations are **and will be** subject to **international**, federal, state, and/or local environmental laws and regulations, including laws relating to the use, handling, storage, disposal and human exposure to hazardous materials. Environmental and health and safety laws and regulations can be complex, and we expect that we will be affected by future amendments to such laws or other new environmental and health and safety laws and regulations which may require us to change our operations, potentially resulting in a

material adverse effect on our business, prospects, financial condition, and operating results. These laws can give rise to liability for administrative oversight costs, cleanup costs, property damage, bodily injury and fines and penalties. Capital and operating expenses needed to comply with environmental laws and regulations can be significant, and violations may result in substantial fines and penalties, third party damages, suspension of production or a cessation of our operations.

Contamination at properties we will own and operate, we formerly owned or operated or to which hazardous substances were sent by us, may result in liability for us under environmental laws and regulations, including, but not limited to the Comprehensive Environmental Response, Compensation and Liability Act, which can impose liability for the full amount of remediation-related costs without regard to fault, for the investigation and cleanup of contaminated soil and ground water, for building contamination and impacts to human health and for damages to natural resources. The costs of complying with environmental laws and regulations and any claims concerning noncompliance, or liability with respect to contamination in the future, could have a material adverse effect on our financial condition or operating results. We may face unexpected delays in obtaining the required permits and approvals in connection with our manufacturing facilities that could require significant time and financial resources and delay our ability to operate these facilities, which would adversely impact our business prospects and operating results.

We are subject to evolving laws, regulations, standards, policies, and contractual obligations related to data privacy and security, and any actual or perceived failure to comply with such obligations could harm our reputation and brand, subject us to significant fines and liabilities, or otherwise affect our business.

In the course of our operations, we collect, use, store, disclose, transfer and otherwise process personal information from our customers, employees and third parties with whom we conduct business, including names, accounts, user IDs and passwords, and payment or transaction related information. Additionally, we are using our trucks' electronic systems to log information about each vehicle's use in order to aid us in vehicle diagnostics, repair and maintenance. Our customers may object to the use of this data, which may increase our vehicle maintenance costs and harm our business prospects. Possession and use of our customers' information in conducting our business may subject us to legislative and regulatory burdens in the United States and the European Union that could require notification of data breaches, restrict our use of such information and hinder our ability to acquire new customers or market to existing customers. Non-compliance or a major breach of our network security and systems could have serious negative consequences for our business and future prospects, including possible fines, penalties and damages, reduced customer demand for our vehicles, and harm to our reputation and brand. Accordingly, we are subject to or affected by a number of federal, state, local and international laws and regulations, as well as contractual obligations and industry standards, that impose certain obligations and restrictions with respect to data privacy and security and govern our collection, storage, retention, protection, use, processing, transmission, sharing and disclosure of personal information including that of our employees, customers and other third parties with whom we conduct business. These laws, regulations and standards may be interpreted and applied differently over time and from jurisdiction to jurisdiction, and it is possible that they will be interpreted and applied in ways that may have a material and adverse impact on our business, financial condition and results of operations.

The global data protection landscape is rapidly evolving, and implementation standards and enforcement practices are likely to remain uncertain for the foreseeable future. We may not be able to monitor and react to all developments in a timely manner. The European Union adopted the General Data Protection Regulation ("GDPR"), which became effective in May 2018, and California adopted the California Consumer Privacy Act of 2018 ("CCPA"), which became effective in January 2020. Both

the GDPR and the CCPA impose additional obligations on companies regarding the handling of personal data and provides certain individual privacy rights to persons whose data is collected. Compliance with existing, proposed and recently enacted laws and regulations (including implementation of the privacy and process enhancements called for under the GDPR and CCPA) can be costly, and any failure to comply with these regulatory standards could subject us to legal and reputational risks.

Specifically, the CCPA establishes a privacy framework for covered businesses, including an expansive definition of personal information and data privacy rights for California consumers. The CCPA includes a framework with potentially severe statutory damages for violations and a private right of action for certain data breaches. The CCPA requires covered businesses to provide California consumers with new privacy-related disclosures and new ways to opt-out of certain uses and disclosures of personal information. As we expand our operations, the CCPA may increase our compliance costs and potential liability. Some observers have noted that the CCPA could mark the beginning of a trend toward more stringent privacy legislation in the United States. Additionally, effective starting on January 1, 2023, the California Privacy Rights Act ("CPRA") will significantly modify the CCPA, including by expanding California consumers' rights with respect to certain sensitive personal information. The CPRA also creates a new state agency that will be vested with authority to implement and enforce the CCPA and the CPRA.

Other states have begun to propose similar laws. Compliance with applicable privacy and data security laws and regulations is a rigorous and time-intensive process, and we may be required to put in place additional mechanisms to comply with such laws and regulations, which could cause us to incur substantial costs or require us to change our business practices, including our data practices, in a manner adverse to our business. In particular, certain emerging privacy laws are still subject to a high degree of uncertainty as to their interpretation and application. Failure to comply with applicable laws or regulations or to secure personal information could result in investigations, enforcement actions and other proceedings against us, which could result in substantial fines, damages and other liability as well as damage to our reputation and credibility, which could have a negative impact on revenues and profits.

We post publicly privacy policies and other documentation regarding our collection, processing, use and disclosure of personal information. Although we endeavor to comply with our published policies and other documentation, we may at times fail to do so or may be perceived to have failed to do so. Moreover, despite our efforts, we may not be successful in achieving compliance if our employees, contractors, service providers, vendors or other third parties fail to comply with our published policies and documentation. Such failures could carry similar consequences or subject us to potential local, state and federal action if they are found to be deceptive, unfair or misrepresentative of our actual practices. Claims that we have violated individuals' privacy rights or failed to comply with data protection laws or applicable privacy notices could, even if we are not found liable, be expensive and time-consuming to defend and could result in adverse publicity that could harm our business.

Most jurisdictions have enacted laws requiring companies to notify individuals, regulatory authorities and other third parties of security breaches involving certain types of data. Such laws may be inconsistent or may change or additional laws may be adopted. In addition, our agreements with certain customers may require us to notify them in the event of a security breach. Such mandatory disclosures are costly, could lead to negative publicity, penalties or fines, litigation and our customers losing confidence in the effectiveness of our security measures and require us to expend significant capital and other resources to respond to or alleviate problems caused by the actual or perceived security breach. Any of the foregoing could materially and adversely affect our business, prospects, operating results and financial condition.

We face risks associated with our international operations, including unfavorable regulatory, political, tax and labor conditions, which could harm our business.

We face risks associated with our international operations, including possible unfavorable regulatory, political, tax and labor conditions, which could harm our business. We have international operations and subsidiaries in Germany Italy, and Canada that are subject to the legal, political, regulatory and social requirements and economic conditions in these jurisdictions. Additionally, as part of our growth strategy, we intend to expand our sales, maintenance and repair services in North America. However, we have no experience to date selling and servicing our vehicles outside of the United States and such expansion may require us to make significant expenditures, including the hiring of local employees

and establishing facilities, in advance of generating any revenue. We are subject to a number of risks associated with international business activities that may increase our costs, impact our ability to sell our alternative fuel and electric trucks and require significant management attention. These risks include:

- conforming our trucks to various international law and regulatory requirements where our trucks are sold, or homologation;
- development and construction of our hydrogen fueling network;
- difficulty in staffing and managing foreign operations;
- difficulties attracting customers in new jurisdictions;
- foreign government taxes, regulations and permit requirements, including foreign taxes that we may not be able to offset against taxes imposed upon us in the United States, and foreign tax and other laws limiting our ability to repatriate funds to the United States;
- fluctuations in foreign currency exchange rates and interest rates, including risks related to any interest rate swap or other hedging activities we undertake;
- United States and foreign government trade restrictions, tariffs and price or exchange controls;
- foreign labor laws, regulations and restrictions;
- changes in diplomatic and trade relationships;
- political instability, natural disasters, war or events of terrorism, including the current conflict involving Ukraine and Russia; and
- the strength of international economies.

If we fail to successfully address these risks, our business, prospects, operating results and financial condition could be materially harmed.

Our ability to use net operating losses to reduce future tax payments may be limited by provisions of the Internal Revenue Code and may be subject to further limitation as a result of future transactions.

Sections 382 and 383 of the Internal Revenue Code of 1986, as amended (the "Code"), contain rules that limit the ability of a company that undergoes an ownership change, which is generally any cumulative change in ownership of more than 50% of its stock over a three-year period, to utilize its net operating loss and tax credit carryforwards and certain built-in losses recognized in the years after the ownership change. These rules generally operate by focusing on ownership changes involving stockholders who directly or indirectly own 5% or more of the stock of a company and any change in ownership arising from a new issuance of stock by the company. Generally, if an ownership change occurs, the yearly taxable income limitation on the use of net operating loss and tax credit carryforwards is equal to the product of the applicable long-term tax exempt rate and the value of our stock immediately before the ownership change. As a result, we may be unable to offset our taxable income with net operating losses, or our tax liability with credits, before these losses and credits expire.

In addition, it is possible that future transactions (including issuances of new shares of our common stock and sales of shares of our common stock) will cause us to undergo one or more additional ownership changes. In that event, we may not be able to use our net operating losses from periods prior to this ownership change to offset future taxable income in excess of the annual limitations imposed by Sections 382 and 383.

We face risks related to health epidemics, including the COVID-19 pandemic, which could have a material adverse effect on our business and results of operations.

We face various risks related to public health issues, including epidemics, pandemics, and other outbreaks, including outbreaks. For example, the illness known as COVID-19. The impact of the COVID-19 pandemic included changes in consumer and business behavior, pandemic fears and market downturns, global supply chain constraints, and restrictions on business and individual activities, created significant volatility in the global economy and led to reduced economic activity. The spread of COVID-19 also created a disruption in the manufacturing, delivery and overall supply chain of vehicle manufacturers and suppliers, including us, and led to a global decrease in vehicle sales in markets around the world.

The pandemic resulted in government authorities implementing numerous measures to try to contain the virus, such as travel bans and restrictions, quarantines, stay-at-home or shelter-in-place orders, and business shutdowns. These measures adversely impacted our employees and operations and the operations of our customers, suppliers, vendors and business partners, and negatively impacted our sales and marketing activities, the construction schedule of our hydrogen fueling stations and our manufacturing plant in Arizona, and the production schedule of our trucks. For example, the headquarters of our former joint venture partner located in Italy was shut down for two months in 2020 due to COVID-19, and as a result, pilot builds for the BEV truck were delayed. In addition, various aspects of our business, manufacturing plant and hydrogen fueling station building process, cannot be conducted remotely. While certain measures by government authorities have been lifted others may be reinstated or remain in place for a significant period of time, which could adversely affect our manufacturing and building plans, sales and marketing activities, business and results of operations.

Specifically, difficult macroeconomic conditions, such as decreases in per capita income and level of disposable income, increased and prolonged unemployment or a decline in consumer confidence due to the acceleration of inflation in the U.S. and the COVID-19 pandemic, as well as reduced spending by businesses, adversely effected the demand for our trucks. Under difficult economic conditions, potential customers may seek to reduce spending by forgoing our trucks for other traditional options, and cancel reservations for our trucks. In addition, in this inflationary environment, end customers were less likely to invest in the necessary charging infrastructure, which affected demand for our trucks. Decreased demand for our trucks would negatively affect our business.

There are no comparable recent events which may provide guidance as to the effect of the spread of COVID-19 and a pandemic, and, as a result, the ultimate impact of the COVID-19 pandemic or a similar health epidemic is highly uncertain and subject to change. We do not yet know the full extent of COVID-19's impact on our business, our operations, or the global economy as a whole. However, the effects could have a material impact on our results of operations, and we will continue to monitor the situation closely.

The unavailability, reduction or elimination of government and economic incentives could have a material adverse effect on our business, prospects, financial condition and operating results.

We currently, and expect to continue to, benefit from certain government subsidies and economic incentives that support the development and adoption of our vehicles, particularly our FCEV and BEV trucks. Any reduction, elimination or discriminatory application of government subsidies and economic incentives because of policy

changes, delays in promulgating regulations implementing new legislation, the reduced need for such subsidies and incentives due to the perceived success of the electric vehicle or other reasons may result in the diminished competitiveness of the alternative fuel and electric vehicle industry generally or our FCEV and BEV trucks in particular. This could materially and adversely affect the growth of the alternative fuel automobile markets and our business, prospects, financial condition and operating results.

These incentives include tax credits, rebates and other incentives for alternative energy production, alternative fuel and electric vehicles, including greenhouse gas ("GHG") emissions credits under the U.S. Environmental Protection Agency's GHG Rule, the California Air Resources Board, California Transportation Commission ("CTC"), New York State Energy Research and Development Authority, and New Jersey Economic Development Authority, HVIP, NYTVIP, and NJZIP. There is no guarantee these programs will be available in the future. If these tax incentives and other benefits are not available or are reduced or otherwise limited in the future, our financial position could be harmed.

Additionally, while the Inflation Reduction Act of 2022 (the "IRA") includes certain federal tax credits and other incentives for alternative energy production and alternative fuel, there is no guarantee these programs will be renewed or extended in the future or that we or our customers will qualify for the tax credits or incentives. If the IRA's tax credits and incentives for our trucks are not available to us or our customers in the future, our business, financial viability and prospects could be adversely affected. The IRA, when combined with other state-based incentives, such as HVIP or NYTVIP incentives, could reduce the overall cost of our truck and the fueling thereof, but the repeal or modification of such incentives could discourage potential customers from purchasing our trucks. These and other changes to tax laws and regulations, or interpretation thereof, in the United States or other tax jurisdictions in which we do business, could adversely impact our business, financial condition, and results of operations.

We may not be able to obtain or agree on acceptable terms and conditions for all or a significant portion of the government grants, loans and other incentives for which we may apply. As a result, our business and prospects may be adversely affected.

We have received and expect to continue applying for federal and state grants, loans and tax incentives under government programs designed to stimulate the economy and support the production of alternative fuel and electric vehicles and related technologies, as well as the sale of hydrogen. We are initially focusing our efforts in California in part because of the incentives that are available. For example, in 2023, the CTC awarded us a \$41.9 million grant under the Trade Corridor

Enhancement Program ("TCEP") to build up to six heavy-duty hydrogen refueling stations across Southern California, subject to compliance with follow on requirements, including timing and completion of certain milestones. We anticipate that in the future there will be new opportunities for us to apply for grants, loans and other incentives from the United States, state and foreign governments. Our ability to obtain funds or incentives from government sources is subject to the availability of funds under applicable government programs, and approval of our applications to participate in such programs. and in certain instances, compliance with ongoing requirements. The application process for these funds and other incentives will likely be highly competitive. We cannot assure you that we will be successful in obtaining any of these additional grants, loans and other incentives, incentives or achieving the follow on requirements to receive funding of grants awarded. If we are not successful in obtaining any of these incentives and we are unable to find alternative sources of funding to meet our planned capital needs, our business and prospects could be materially and adversely affected.

Further, accepting funding from governmental entities or in-licensing patent rights from third parties that are co-owned with governmental entities may result in the U.S. government having certain rights, including so-called march-in rights, to such patent rights and any products or technology developed from such patent rights. When new technologies are developed with U.S. government funding, the U.S. government generally obtains certain rights in any resulting patents, including a nonexclusive license authorizing the U.S. government to use the invention for noncommercial purposes. These rights may permit the U.S. government to disclose our confidential information to third parties and to exercise march-in rights to use or to allow third parties to use our licensed technology. The U.S. government can exercise its march-in rights if it determines that action is necessary because we fail to achieve the practical application of government-funded technology, because action is necessary to alleviate health or safety needs, to meet requirements of federal regulations, or to give preference to U.S. industry. In addition, our rights in such inventions may be subject to certain requirements to manufacture products embodying such inventions in the United States. Any exercise by the U.S. government of such rights could harm our competitive position, business, financial condition, results of operations and prospects.

The evolution of the regulatory framework for autonomous vehicles is outside of our control and we cannot guarantee that our trucks will achieve the requisite level of autonomy to enable driverless systems within our projected timeframe, if ever.

There are currently no federal U.S. regulations pertaining to the safety of self-driving vehicles. However, the National Highway Traffic and Safety Administration has established recommended guidelines. Certain states have legal restrictions on self-driving vehicles, and many other states are considering them. This patchwork increases the difficulty in legal compliance for our vehicles should we deploy autonomous driving features. In Europe, certain vehicle safety regulations apply to self-driving braking and steering systems, and certain treaties also restrict the legality of certain higher levels of self-driving vehicles. Self-driving laws and regulations are expected to continue to evolve in numerous jurisdictions in the U.S. and may restrict autonomous driving features that we may deploy.

We may be subject to risks associated with autonomous driving technology.

Our trucks can be designed with connectivity for future installation of an autonomous hardware suite and we plan to partner with a third-party software provider in the future to potentially implement Level 2 ("L2") autonomous capabilities. However, we cannot guarantee that we will be able to identify a third party to provide the necessary hardware and software to enable driverless Level 4 or Level 5 autonomy in an acceptable timeframe, on terms satisfactory to us, or at all. Autonomous driving technologies are subject to risks and there have been accidents and fatalities associated with such technologies. The safety of such technologies depends in part on user interaction and users, as well as other drivers on the roadways, may not be accustomed to using or adapting to such technologies. To the extent accidents associated with our L2 autonomous driving systems occur, we could be subject to liability, negative publicity, government scrutiny and further regulation. Any of the foregoing could materially and adversely affect our results of operations, financial condition and growth prospects.

Unfavorable publicity, or a failure to respond effectively to adverse publicity, could harm our reputation and adversely affect our business.

As an early stage company, maintaining and enhancing our brand and reputation is critical to our ability to attract and retain employees, partners, customers and investors, and to mitigate legislative or regulatory scrutiny, litigation and government investigations. Significant negative publicity has adversely affected our brand and reputation and our stock price. Negative publicity has and may in the future give rise to litigation and/or governmental investigations. Unfavorable publicity relating to us or those affiliated with us, including our former executive chairman and our recent vehicle recall, has and may in the future adversely affect public perception of the entire company. Adverse publicity and its effect on overall public perceptions of our brand, or our failure to respond effectively to adverse publicity, could have a material adverse effect on our business.

The negative publicity has made it more difficult for us to attract and retain employees, partners and customers, reduced confidence in our products and services, harmed investor confidence and the market price of our common stock, invited legislative and regulatory scrutiny and resulted in litigation and governmental investigations and penalties. As a result, customers, potential customers, partners and potential partners have failed to award us additional business, or cancelled or

sought to cancel existing contracts or otherwise, or direct future business to our competitors, and may in the future take similar actions, and investors may invest in our competitors instead of us. See Note 12, *Commitments and Contingencies*, to the consolidated financial statements included elsewhere in this Quarterly Report on Form 10-Q and to Note 14, *Commitments and Contingencies*, in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, for additional information.

The successful rehabilitation of our brand will depend largely on regaining a good reputation, meeting business milestones, satisfying the requirements of customers, meeting our fueling commitments, **under our future bundled lease arrangements or other customer arrangements**, maintaining a high quality of service, **under our future bundled lease arrangements**, improving our compliance programs and continuing our marketing and public relations efforts. Expenses related to our brand promotion, reputation building, and media strategies have been significant and our efforts may not be successful. We anticipate that other competitors and potential competitors will expand their offerings, which will make maintaining and enhancing our reputation and brand increasingly more difficult and expensive. If we fail to successfully rehabilitate our brand in the current or future competitive environment or if events similar to the negative publicity occur in the future, our brand and reputation would be further damaged and our business may suffer.

Although we maintain insurance for the disruption of our business and director and officer liability insurance, these insurance policies will not be sufficient to cover all of our potential losses and may not continue to be available to us on acceptable terms, if at all.

Social media platforms present risks and challenges that could cause damage to our brand and reputation, and which could subject us to liability, penalties and other restrictive sanctions.

Social media platforms present risks and challenges that have resulted, and may in the future result in damage to our brand and reputation, and which could subject us to liability, penalties and other restrictive sanctions. Our internal policies and procedures regarding social media have not been, and may not in the future, be effective in preventing the inappropriate use of social media platforms, including blogs, social media websites and other forms of Internet-based communications. These platforms allow individuals access to a broad audience of consumers, investors and other interested persons. The considerable expansion in the use of social media over recent years has increased the volume and speed at which negative publicity arising from these events can be generated and spread, and we may be unable to timely respond to, correct any inaccuracies in, or adequately address negative perceptions arising from such coverage. The use of such platforms by our **officers and other employees and former officers and employees** has adversely impacted, and could in the future adversely impact our costs, and our brand and reputation, and has resulted, and could in the future result in the disclosure of confidential information, litigation and regulatory inquiries. Any such litigation or regulatory inquiries may result in significant penalties and other restrictive sanctions and adverse consequences. In addition, negative or inaccurate posts or comments about us on social media platforms could damage our reputation, brand image and goodwill, and we could lose the confidence of our customers and partners, regardless of whether such information is true and regardless of any number of measures we may take to address them. We are currently party to litigation and regulatory proceedings related in part to social media statements. See Legal Proceedings in Note 12, *Commitments and Contingencies*, to the consolidated financial statements included elsewhere in this Quarterly Report on Form 10-Q and to Note 14, *Commitments and Contingencies*, in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, for additional information.

Concentration of ownership among our executive officers and directors and their affiliates, and voting restrictions, may prevent new investors from influencing significant corporate decisions.

As of June 30, 2023, Mark A. Russell, our former President, Chief Executive Officer and director, beneficially owned, directly or indirectly, approximately 5.8%, of our outstanding common stock, and our directors and executive officers as a group beneficially own approximately 6.9% of our outstanding common stock. As a result, these stockholders will be able to exercise a significant level of control over all matters requiring stockholder approval, including the election of directors, any amendment of our second amended and restated certificate of incorporation ("Certificate of Incorporation"), and approval of significant corporate transactions. This control could have the effect of delaying or preventing a change of control or changes in management and will make the approval of certain transactions difficult or impossible without the support of these stockholders.

As of June 30, 2023, Trevor R. Milton, our founder and former executive chairman, beneficially owned, directly or indirectly, approximately 6.8% of our outstanding common stock. In connection with his departure in September 2020, for a period of three years from September 20, 2020, Mr. Milton has agreed to certain standstill provisions, including, among other things, agreeing not to (i) acquire ownership (beneficial or otherwise) of more than 19 million shares of our outstanding

common stock in the aggregate, together with shares held by his affiliates and associates, (ii) propose or effect any extraordinary transaction with respect to us, (iii) solicit any proxy or consent with respect to the election or removal of directors or any other proposal, (iv) seek representation on our board of directors or the removal of any member of our board of directors, or (v) submit any stockholder proposal. In addition, for a period of three years from September 20, 2020, Mr. Milton has agreed to vote his shares of our common stock (x) in favor of the slate of directors recommended by our board of directors at any meeting of our stockholders and (y) against the election of any nominee for director not recommended and nominated by our board of directors for election at such meeting. These standstill and voting restrictions could have the effect of delaying or preventing a change of control or changes in management and will make the approval of certain transactions difficult or impossible without the support of our executive officers and directors and their affiliates.

Risks Related to Our Intellectual Property

We may need to defend ourselves against patent or trademark infringement, or other intellectual property claims, which may be time-consuming and cause us to incur substantial costs.

Companies, organizations or individuals, including our competitors, may own or obtain patents, trademarks or other proprietary rights that would prevent or limit our ability to make, use, develop or sell our vehicles or components, which could make it more difficult for us to operate our business. We may receive inquiries from patent or trademark owners inquiring whether we infringe their proprietary rights. Companies owning patents or other intellectual property rights relating to battery packs, electric motors, fuel cells or electronic power management systems may allege infringement of such rights. In response to a determination that we have infringed upon a third party's intellectual property rights, we may be required to do one or more of the following:

- cease development, sales, or use of vehicles that incorporate the asserted intellectual property;
- pay substantial damages;
- obtain a license from the owner of the asserted intellectual property right, which license may not be available on reasonable terms or at all; or

- redesign one or more aspects or systems of our trucks.

A successful claim of infringement against us could materially and adversely affect our business, prospects, operating results and financial condition. Any litigation or claims, whether valid or invalid, could result in substantial costs and diversion of resources.

We also ~~plan to license~~ have licensed patents and other intellectual property from third parties, including suppliers and service providers, and we may face claims that our use of this in-licensed technology infringes the intellectual property rights of others. In such cases, we will seek indemnification from our licensors. However, our rights to indemnification may be unavailable or insufficient to cover our costs and losses.

We may also face claims challenging our use of open source software and our compliance with open source license terms. While we monitor our use of open source software and try to ensure that none is used in a manner that would require us to disclose or license our proprietary source code or that would otherwise breach the terms of an open source agreement, such use could inadvertently occur, or could be claimed to have occurred. Any breach of such open source license or requirement to disclose or license our proprietary source code could harm our business, financial condition, results of operations and prospects.

Our business may be adversely affected if we are unable to protect our intellectual property rights from unauthorized use by third parties.

Failure to adequately protect our intellectual property rights could result in our competitors offering similar products, potentially resulting in the loss of some of our competitive advantage, and a decrease in our revenue which would adversely affect our business, prospects, financial condition and operating results. Our success depends, at least in part, on our ability to protect our core technology and intellectual property. To accomplish this, we ~~will~~ rely on a combination of patents, trade secrets (including know-how), employee and third-party nondisclosure agreements, copyright, trademarks, intellectual property licenses and other contractual rights to establish and protect our rights in our technology. We cannot guarantee that we have entered into such agreements with each party that may have or have had access to our trade secrets or proprietary information, including our technology and processes. In connection with our collaboration, partnership and license agreements, our rights to use licensed or jointly owned technology and intellectual property under such agreements may be subject to the continuation of and compliance with the terms of those agreements. In some cases, we may not control the prosecution, maintenance or filing of licensed or jointly owned patent rights, or the enforcement of such patents against third parties.

The protection of our intellectual property rights ~~will be~~ is important to our business and future business opportunities. However, the measures we take to protect our intellectual property from unauthorized use by others may not be effective for various reasons, including the following:

- any patent applications we submit may not result in the issuance of patents;
- the scope of our issued patents may not be broad enough to protect our proprietary rights;
- our issued patents may be challenged and/or invalidated by our competitors;
- the costs associated with enforcing patents, confidentiality and invention agreements or other intellectual property rights may make aggressive enforcement impracticable;
- current and future competitors may circumvent our patents; and
- our in-licensed patents may be invalidated, or the owners of these patents may breach our license arrangements.

Patent, trademark, and trade secret laws vary significantly throughout the world. Some foreign countries do not protect intellectual property rights to the same extent as do the laws of the United States. Further, policing the unauthorized use of our intellectual property in foreign jurisdictions may be difficult. Therefore, our intellectual property rights may not be as strong or as easily enforced outside of the United States.

Our patent applications may not issue as patents, which may have a material adverse effect on our ability to prevent others from commercially exploiting products similar to ours.

We cannot be certain that we are the first inventor of the subject matter to which we have filed a particular patent application, or if we are the first party to file such a patent application. If another party has filed a patent application to the same subject matter as we have, we may not be entitled to the protection sought by the patent application. Further, the scope of protection of issued patent claims is often difficult to determine. As a result, we cannot be certain that the patent applications that we file will issue, or that our issued patents will afford protection against competitors with similar technology. In addition, our competitors may design around our issued patents, which may adversely affect our business, prospects, financial condition or operating results.

Risks Related to Our Convertible Indebtedness

Servicing our debt may require a significant amount of cash, and we may not have sufficient cash flow from our business to pay our substantial debt.

In June 2022, we issued \$200.0 million As of September 30, 2023, \$119.3 million aggregate principal amount of our June 2022 Toggle Convertible Notes in a private placement. On April 11, 2023, we issued \$100.0 million aggregate principal amount of our April 2023 Toggle Convertible Notes in a private placement in exchange for \$100.0 million aggregate principal amount of our June 2022 Toggle Convertible Notes, and immediately following such exchange, \$110.9 million aggregate principal amount of the June 2022 Toggle Convertible Notes and \$100.0 million aggregate principal amount of the April 2023 Toggle Convertible Notes were outstanding. On June 23, 2023, we issued \$11.0 million of our June 2023 Toggle Convertible Notes in connection with obtaining consents from the holders of the June 2022 Toggle Convertible Notes and April 2023 Toggle Convertible Notes to release Romeo as a guarantor of such Toggle Convertible Notes.

The terms of the Toggle Convertible Notes allow us to issue additional Toggle Convertible Notes in lieu of paying cash interest thereon.

In December 2022, August 2023, we entered into a securities purchase agreement under which we may sell up to \$125.0 million \$325.0 million in initial principal amount of senior convertible notes or the short-term convertible notes.(the "Senior Convertible Notes"). We completed the sale of \$50.0 million \$125.0 million principal amount of the short-term convertible notes Senior Convertible Notes in December 2022, an additional \$25.0 million principal amount of the short-term convertible notes in March August 2023 and an additional \$27.1 million \$40.0 million principal amount of the short-term convertible notes Senior Convertible Notes in May September 2023.

As of September 30, 2023, \$32.4 million aggregate principal amount of Senior Convertible Notes were outstanding.

Our ability to make scheduled payments of the principal of, to pay interest on or to refinance the Toggle Convertible Notes, the short-term convertible notes any unconverted Senior Convertible Notes or any future indebtedness we may incur depends on our future performance, which is subject to economic, financial, competitive and other factors beyond our control. While, in lieu of paying cash interest on the Toggle Convertible Notes, we may elect to pay interest in kind, that election will increase the aggregate principal amount of the Toggle Convertible Notes. In addition, while in lieu of paying cash interest on the short-term convertible notes Senior Convertible Notes, we may elect to pay interest through issuance of in kind notes, that election will result in a dilutive issuance of shares of our common stock. Our business has not and may not in the future generate cash flow from operations in the future sufficient to service our debt and make necessary capital expenditures, expenditures, or to repay our outstanding indebtedness. If we are unable to generate adequate cash flow, we may be required to adopt one or more alternatives, such as selling assets, restructuring debt or obtaining additional equity capital on terms that may be onerous or highly dilutive. Our ability to refinance our indebtedness will depend on the capital markets and our financial condition at such time. We may not be able to engage in any of these activities or engage in these activities on desirable terms, which could result in a default on our debt obligations.

We may incur a substantial amount of debt or take other actions which would intensify the risks discussed above, and significant indebtedness may prevent us from taking actions that we would otherwise consider to be in our best interests.

We and our subsidiaries may be able to incur substantial additional debt in the future, subject to the restrictions contained in our debt instruments, some of which may be secured debt. The Toggle Convertible Notes Indentures allow us to incur secured debt of up to \$500.0 million.

In addition, our indebtedness, combined with our other financial obligations and contractual commitments, could have other important consequences. For example, it could:

- make us more vulnerable to adverse changes in general U.S. and worldwide economic, industry and competitive conditions and adverse changes in government regulation;
- limit our flexibility in planning for, or reacting to, changes in our business and our industry;
- place us at a disadvantage compared to our competitors who have less debt; and
- limit our ability to borrow additional amounts for working capital and other general corporate purposes, including to fund possible acquisitions of, or investments in, complementary businesses, products, services and technologies.

Any of these factors could materially and adversely affect our business, financial condition and results of operations.

We may not have the ability to raise the funds necessary to settle conversions of our convertible notes in cash or to repurchase the convertible notes upon a fundamental change or change in control transaction, and our future debt may contain limitations on our ability to pay cash upon conversion or repurchase of the convertible notes.

Holders of the Toggle Convertible Notes have the right to require us to repurchase all or any portion of their the Toggle Convertible Notes upon the occurrence of a fundamental change or a change in control transaction as defined in the Toggle Convertible Notes Indentures at a repurchase price equal to 100% of the capitalized principal amount of such Toggle Convertible Notes to be repurchased, in the case of a fundamental change, or 130% of the capitalized principal amount of such Toggle Convertible Notes to be repurchased, in the case of a change in control transaction, plus accrued and unpaid interest, if any. Holders of the short-term convertible notes Senior Convertible Notes have the right to require us to redeem all or any portion of their unconverted notes in cash upon the occurrence of a change of control as defined in those notes at a price equal to 115% of the greatest of the principal amount to be redeemed, the conversion value of those notes as determined pursuant to those notes, and the change of control consideration payable on the underlying shares. In addition, upon conversion of the Toggle Convertible Notes, unless we elect, and are permitted at such time, to deliver solely shares of our common stock to the extent permitted under the Toggle Convertible Notes Indentures to settle such conversion (other than paying cash in lieu of delivering any fractional share), we will be required to make cash payments in respect of the Toggle Convertible Notes being converted. However, we may not have enough available cash or be able to obtain financing at the time we are required to make repurchases of convertible notes surrendered therefore or pay cash upon conversions of the Toggle Convertible Notes. In addition, our ability to repurchase the Toggle Convertible Notes, redeem the short-term convertible notes Senior Convertible Notes, or to pay cash upon conversions of the Toggle Convertible Notes may be limited by law, by regulatory authority or by agreements governing our future indebtedness. Our failure to repurchase the Toggle Convertible Notes at a time when the repurchase is required by the Toggle Convertible Notes Indentures or to pay any cash payable on future conversions of the Toggle Convertible Notes as required by the Toggle Convertible Notes

Indentures would constitute a default under that Toggle Convertible Notes Indenture. Similarly, our failure to redeem the short-term convertible notes Senior Convertible Notes when required by the terms of those notes would constitute a default under the indenture governing those notes. A default under the Toggle Convertible Notes Indentures or the indenture governing the short-term convertible notes Senior Convertible Notes or the occurrence of the fundamental change itself could also lead to a default under agreements governing our existing or future indebtedness. If the repayment of the related indebtedness were to be accelerated after any applicable notice or grace periods, we may not have sufficient funds to repay the indebtedness and repay or redeem the short-term convertible notes Senior Convertible Notes, repurchase the Toggle Convertible Notes or make cash payments upon conversions of the Toggle Convertible Notes.

The conditional conversion feature of the 2026 notes, Toggle Convertible Notes, if triggered, may adversely affect our financial condition and operating results.

In the event the conditional conversion feature of the Toggle Convertible Notes is triggered, holders of the Toggle Convertible Notes will be entitled to convert the Toggle Convertible Notes held by them at any time during specified periods at their option. If one or more holders elect to convert their Toggle Convertible Notes, unless we elect to satisfy our conversion obligation to the extent permitted by the Toggle Convertible Notes Indentures by delivering solely shares of our common stock (other than paying cash in lieu of delivering any fractional share), we would be required to settle a portion or all of our conversion obligation through the payment of cash, which could adversely affect our liquidity. In addition, even if holders do not elect to convert their Toggle Convertible Notes, we could be required under applicable accounting rules to reclassify all or a portion of the outstanding principal of the Toggle Convertible Notes as a current rather than long-term liability, which would result in a material reduction of our net working capital.

Risks Related to Operating as a Public Company

We incur significant increased expenses and administrative burdens as a public company, which could have an adverse effect on our business, financial condition and results of operations.

We incur increased significant legal, accounting, administrative and other costs and expenses as a public company that we did not incur as a private company. The Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), including the requirements of Section 404, as well as rules and regulations subsequently implemented by the SEC, the Dodd-

Frank Wall Street Reform and Consumer Protection Act of 2010 and the rules and regulations promulgated and to be promulgated thereunder, the Public Company Accounting Oversight Board and the securities exchanges, impose additional reporting and other obligations on public companies. Our management and other personnel need to devote a substantial amount of time to these compliance and disclosure obligations. If these requirements divert the attention of our management and personnel from other aspects of our business, they could have a material adverse effect on our business, financial condition and results of operations. Moreover, these rules and regulations applicable to public companies substantially increase our legal, accounting and financial compliance costs, require that we hire additional personnel and make some activities more time-consuming and costly. It may also be more expensive for us to obtain director and officer liability insurance.

We identified a material weakness in our internal control over financial reporting. If we are unable to remediate this material weakness, or if we experience additional material weaknesses or other deficiencies in the future or otherwise fail to maintain an effective system of internal control over financial reporting, we may not be able to accurately or timely report our financial results.

Our management is responsible for establishing and maintaining adequate internal control over financial reporting and for evaluating and reporting on the effectiveness of our system of internal control. As a public company, we are required by Section 404 of the Sarbanes-Oxley Act to evaluate the effectiveness of our internal control over financial reporting. We must also include a report issued by our independent registered public accounting firm based on their audit of our internal controls over financial reporting.

In connection with our year-end assessment of internal control over financial reporting, we determined that, as of December 31, 2022, we did not maintain effective internal control over financial reporting because of a material weakness associated with ineffective information technology general controls ("ITGCs"), ITGCs, in the areas of user access and change management for the IT system that supports our financial reporting processes. We believe that these control deficiencies were a result of insufficient training of personnel on the operation and importance of ITGCs and inadequate risk-assessment processes resulting in failure to identify and assess risks in IT environments that could impact internal control over financial reporting. Management also deemed ineffective certain automated and manual business process controls that are dependent on the affected

ITGCs, because they could have been adversely impacted to the extent that they rely upon information and configurations from the affected IT system.

We have taken and continue to take steps to remediate the control deficiencies contributing to the material weakness, such that these controls are designed, implemented and operating effectively. These remediation actions include: (i) developing and deploying a training program regarding the operation and importance of ITGCs and policies, including educating control owners concerning the principles and requirements of each control, with a focus on those controls involving user access to IT systems and change management of IT systems that support financial reporting processes; (ii) developing and maintaining documentation of ITGCs to facilitate knowledge transfer in the event of personnel and function changes; and (iii) enhancing management's review and testing plan to monitor ITGCs with a specific focus on IT systems supporting our financial reporting processes. Although we have improved our controls intended to remediate this material weakness, we cannot be certain as to when or if remediation will be complete. Further, remediation efforts place a significant burden on management and add increased pressure to our financial and IT resources and processes. As a result, we may not be successful in making the improvements necessary to remediate the material weakness identified by management, be able to do so in a timely manner, or be able to identify and remediate additional control deficiencies, including material weaknesses, in the future. For further discussion of the material weaknesses identified and our remedial efforts, see see Item 4. Controls and Procedures, included elsewhere in this Quarterly Report on Form 10-Q, and Item 9A. Controls and Procedures of our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, for additional information.

Additionally, the Company identified a material weakness in internal control over financial reporting in connection with the review of our unaudited consolidated financial statements for the three months ended September 30, 2023. A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting such that it is reasonably possible that a material misstatement of the annual or interim financial statements will not be prevented or detected on a timely basis. The material weakness identified is a result of certain control deficiencies related to the precision of our review for the valuation and remeasurement of the embedded derivative liability of our Toggle Convertible Notes as of June 30, 2023 and September 30, 2023. In response to this material weakness, we intend to enhance the control execution to ensure the Company's review of the completeness of features included in valuations.

Any failure to maintain internal control over financial reporting could severely inhibit our ability to accurately report our financial condition or results of operations. The effectiveness of our controls and procedures may be limited by a variety of factors, including:

- faulty human judgment and simple errors, omissions, or mistakes;
- fraudulent action of an individual or collusion of two or more people;
- inappropriate management override of procedures; and
- the possibility that any enhancements to controls and procedures may still not be adequate to assure timely and accurate financial control.

Our ability to comply with the annual internal control report requirements will depend on the effectiveness of our financial reporting and data systems and controls across our company. We expect these systems and controls to involve significant expenditures and to become increasingly complex as our business grows. To effectively manage this complexity, we will need to continue to improve our operational, financial, and management controls, and our reporting systems and procedures. Our inability to successfully remediate our existing or any future material weaknesses or other deficiencies in our internal control over financial reporting or any failure to implement required new or improved controls, or difficulties encountered in the implementation or operation of these controls, could harm our operating results and cause us to fail to meet our financial reporting obligations or result in material misstatements in our financial statements, which could adversely affect our liquidity and access to capital markets, our business and investor confidence in us, and our stock price.

Interest in our common stock from our significant base of retail and other individual investors could result in increased volatility in the market price of our common stock, which could have a material adverse impact on the market price of our common stock and your investment.

Retail and other individual investors, which make up a significant segment of our overall stockholder base, have played a significant role in recent market dynamics that have resulted in substantial increases and volatility in the market prices of "meme" stocks. For example, the market prices and trading volumes of the common stock of GameStop Corp., AMC Entertainment Holdings, Inc. and certain other "meme" stocks, have recently experienced, and may continue to experience, extreme volatility. The rapid and substantial increases or decreases in the market prices of these "meme" stocks may be unrelated to operating performance, macroeconomic trends or industry fundamentals, and substantial increases in the value of such stocks may obscure the significant risks and uncertainties that the issuer faces. This volatility has been attributed, in part, to strong and atypical retail investor interest, including as may be expressed on financial trading and other social media sites and online forums such as r/wallstreetbets.

forums.

We have in the past and may in the future experience significant interest in our common stock from such investors, and as a result the market price of our common stock has been and may continue to be volatile. There is no guarantee that we will continue to benefit from such retail and individual investor interest, even if our business or financial performance is strong. If investor sentiment changes, this could have a material adverse impact on the market price of our common stock and your investment.

Retail and individual investor sentiment (including as may be expressed on financial trading and other social media sites and online forums) may also influence the amount and status of short interest in our common stock. This could has and may in the future increase the likelihood of our common stock being the target of a "short squeeze", particularly because a large proportion of our common stock has been in the past and may in the future be traded by short sellers. A short squeeze and/or focused investor trading in anticipation of a short squeeze could has and may in the future lead to volatile price movements in shares of our common stock that may be unrelated or disproportionate to our operating performance or prospects. Or, if investors no longer believe a short squeeze is viable, the market price of our common stock may rapidly decline. Accordingly, investors that purchase shares of our common stock during a short squeeze may lose a significant portion of their investment.

Furthermore, short squeeze and/or other focused trading activity stemming from negative sentiment across our retail investor base could result in declines in the market price of our common stock such that our eligibility to remain listed on Nasdaq may be adversely impacted, which could impair our ability to access the capital markets and otherwise raise capital in the future. See "General Risk Factors—if we fail to satisfy all applicable Nasdaq continued listing requirements, our common stock may be delisted from Nasdaq, which could have an adverse impact on the liquidity and market price of our common stock."

General Risk Factors

We have never paid dividends on our capital stock, and we do not anticipate paying dividends in the foreseeable future.

We have never paid dividends on any of our capital stock and currently intend to retain any future earnings to fund the growth of our business. Any determination to pay dividends in the future will be at the discretion of our board of directors, and will depend on our financial condition, operating results, capital requirements, general business conditions and other factors that our board of directors may deem relevant. As a result, capital appreciation, if any, of our common stock will be the sole source of gain for the foreseeable future.

Our stock price is volatile, and you may not be able to sell shares of our common stock at or above the price you paid.

The trading price of our common stock is volatile and has been and may in the future be subject to wide fluctuations in response to various factors, some of which are beyond our control. For example, the trading price of our common stock declined following the release of the short seller short-seller article, which contains certain allegations against us. Other factors that have or may cause our stock price to fluctuate include, but are not limited to:

- our progress on achievement of business milestones and objectives;
- actual or anticipated fluctuations in operating results;
- our need for additional capital;
- failure to meet or exceed financial estimates and projections of the investment community or that we provide to the public;
- issuance of new or updated research or reports by securities analysts or changed recommendations for our stock or the transportation industry in general;
- announcements by us or our competitors of significant acquisitions, capital commitments or the entrance into or discontinuation of strategic partnerships, joint ventures or collaborations;
- operating and share price performance of other companies that investors deem comparable to us;
- recalls, including our recent BEV truck recall;
- our focus on long-term goals over short-term results;
- the timing and magnitude of our investments in the growth of our business;
- actual or anticipated changes in laws and regulations affecting our business;
- additions or departures of key management or other personnel;
- disputes or other developments related to our intellectual property or other proprietary rights, including litigation;
- our ability to market new and enhanced products and technologies on a timely basis;
- sales of substantial amounts of our common stock, including sales by our directors, executive officers or significant stockholders or the perception that such sales could occur;
- changes in our capital structure, including future issuances of securities or the incurrence of debt; and
- general economic, political and market conditions.

In addition, the stock market in general, and The Nasdaq Stock Market LLC ("Nasdaq") in particular, has experienced extreme price and volume fluctuations that have often been unrelated or disproportionate to the operating performance of those companies.

The closing price of our common stock on Nasdaq ranged from \$0.54 to \$8.05 from May 2, 2022 through **August 2, 2023****October 31, 2023**. The price of our common stock also decreased substantially following public announcements made by us. In addition, broad market and industry factors, including the COVID-19 pandemic and the war in Ukraine, may seriously affect the market price of our common stock, regardless of our actual operating performance.

Any investment in our common stock is subject to extreme volatility and could result in the loss of your entire investment. In addition, in the past, following periods of volatility in the overall market and the market price of a particular company's securities, securities class action litigation has often been instituted against these companies. This litigation, which has and may in the future be instituted against us, could result in substantial costs and a diversion of our management's attention and resources. See Note 12, *Commitments and Contingencies*, to the consolidated financial statements included elsewhere in this Quarterly Report on Form 10-Q and Note 14, *Commitments and Contingencies*, in our Annual Report on Form 10-K for the year ended December 31, 2022, as amended, for additional information.

If we fail to satisfy all applicable Nasdaq continued listing requirements, our common stock may be delisted from Nasdaq, which could have an adverse impact on the liquidity and market price of our common stock.

Our common stock is currently listed on **The Nasdaq, Stock Market**, which has qualitative and quantitative continued listing requirements, including corporate governance requirements, public float requirements, and a \$1.00 minimum closing bid price requirement. Our common stock price has been in the recent past and may in the future be below the minimum bid price for continued listing on Nasdaq resulting in a delisting notice, and we receive a delisting notice subsequently regained compliance. If our common stock again trades at closing bid prices below \$1.00 for 30 consecutive business days in the future, or if we are unable to satisfy any of the other continued listing requirements, Nasdaq may take steps to delist our common stock. We recently received notice from Nasdaq that we regained compliance with Nasdaq Rules by maintaining a closing bid price of \$1.00 per share or greater. Delisting would likely have an adverse effect on the liquidity of our common stock, decrease the market price of our common stock, result in the potential loss of confidence by investors, suppliers, customers, and employees, and fewer business development opportunities, and adversely affect our ability to obtain financing for our continuing operations. In addition, delisting would constitute an event of default under the Toggle Convertible Notes Indentures and other indebtedness and the reasonable prospect of delisting could result in an equity conditions failure under our senior convertible notes, and the securities purchase agreement, which could affect our ability to elect to repay our outstanding indebtedness, pay interest on our senior convertible notes in shares of our common stock and our ability to sell additional notes under the securities purchase agreement.

If we are unable to attract and retain key employees and hire qualified management, technical and engineering personnel, our ability to compete could be harmed.

Our success depends, in part, on our ability to retain our key personnel. The unexpected loss of or failure to retain one or more of our key employees could adversely affect our business.

Our success also depends, in part, on our continuing ability to identify, hire, attract, train and develop other highly qualified personnel, including management, technical and engineering personnel. Qualified individuals are in high demand, particularly in the vehicle technology industry. Competition for individuals with experience designing, manufacturing and servicing electric vehicles is intense, and we may not be able to attract, integrate, train, motivate or retain additional highly qualified personnel in the future. Furthermore, our ability to hire, attract and retain them may depend on our ability to provide competitive compensation. We use equity awards to attract talented employees, but if the value of our common stock declines significantly, as it has in the recent past, and remains depressed, it may prevent us from recruiting and retaining qualified employees. We may not be able to attract, integrate, train or retain qualified personnel in the future. Additionally, we may not be able to hire new employees quickly enough to meet our needs. Our failure to do so could adversely affect our business and prospects, including the execution of our global business strategy.

Our Certificate of Incorporation provides, subject to limited exceptions, that the Court of Chancery of the State of Delaware will be the sole and exclusive forum for certain stockholder litigation matters, which could limit our stockholders' ability to obtain a favorable judicial forum for disputes with us or our directors, officers, employees or stockholders.

Our Certificate of Incorporation requires, to the fullest extent permitted by law, that derivative actions brought in our name, actions against directors, officers and employees for breach of fiduciary duty and other similar actions may be brought in the Court of Chancery in the State of Delaware or, if that court lacks subject matter jurisdiction, another federal or state court situated in the State of Delaware. Any person or entity purchasing or otherwise acquiring any interest in shares of our capital stock shall be deemed to have notice of and consented to the forum provisions in our Certificate of Incorporation. In addition, our Certificate of Incorporation and our amended and restated bylaws ("Bylaws") will provide that the federal district courts of the United States shall be the exclusive forum for the resolution of any complaint asserting a cause of action under the Securities Act and the Exchange Act.

In March 2020, the Delaware Supreme Court issued a decision in *Salzburg et al. v. Sciabacucchi*, which found that an exclusive forum provision providing for claims under the Securities Act to be brought in federal court is facially valid under Delaware law. It is unclear whether this decision will be appealed, or what the final outcome of this case will be. We intend to enforce this provision, but we do not know whether courts in other jurisdictions will agree with this decision or enforce it.

This choice of forum provision may limit a stockholder's ability to bring a claim in a judicial forum that it finds favorable for disputes with us or any of our directors, officers, other employees or stockholders, which may discourage lawsuits with respect to such claims. Alternatively, if a court were to find the choice of forum provision contained in our Certificate of Incorporation to be inapplicable or unenforceable in an action, we may incur additional costs associated with resolving such action in other jurisdictions, which could harm our business, operating results and financial condition.

If securities or industry analysts issue an adverse recommendation regarding our stock or do not publish research or reports about our company, our stock price and trading volume could decline.

The trading market for our common stock depends in part on the research and reports that equity research analysts publish about us and our business. We do not control these analysts or the content and opinions included in their reports. Securities analysts may elect not to provide research coverage of our company and such lack of research coverage may adversely affect the market price of our common stock. The price of our common stock could also decline if one or more equity research analysts downgrade our common stock, change their price targets, issue other unfavorable commentary or cease publishing reports about us or our business. For example, in September 2020, an entity published an article containing certain allegations against us that we believe has negatively impacted the trading price of our common stock. If one or more equity research analysts cease coverage of our company, we could lose visibility in the market, which in turn could cause our stock price to decline.

Certain of our warrants are accounted for as liabilities and the changes in value of our warrants could have a material effect on our financial results.

We are required to measure the fair value of certain of our warrants at the end of each reporting period and recognize changes in the fair value from the prior period in our operating results for the current period. As a result of the recurring fair value measurement, our financial statements and results of operations may fluctuate quarterly based on

factors which are outside our control. We expect that we will recognize non-cash gains or losses due to the quarterly fair valuation of certain of our warrants and that such gains or losses could be material.

ITEM 5. OTHER INFORMATION

(c) Trading Plans

During the quarter ended **June 30, 2023** **September 30, 2023**, no director or officer adopted or terminated any contract, instruction or written plan for the purchase or sale of securities of the Company pursuant to Rule 10b5-1(c) or any non-Rule 10b5-1 trading arrangement (as defined in Regulation S-K Item 408(c)).

ITEM 6. EXHIBITS

Exhibit No.	Description
2.1	Agreement and Plan of Merger and Reorganization, dated as of July 30, 2022, by and among Nikola Corporation, J Purchaser Corp. and Romeo Power, Inc. (incorporated by reference to Exhibit 2.1 to the Registrant's Current Report on Form 8-K filed on August 2, 2022).
3.1	Second Amended and Restated Certificate of Incorporation (incorporated by reference to Exhibit 3.1 to the Registrant's Registration Statement on Form S-1 (File No. 333-239185)).
3.2	Certificate of Amendment of the Second Amended and Restated Certificate of Incorporation of Nikola Corporation (incorporated by reference to Exhibit 3.2 to the Registrant's Registration Statement on Form S-4 filed August 29, 2022).
3.3	Certificate of Amendment of the Second Amended and Restated Certificate of Incorporation of Nikola Corporation.
3.4	Amended and Restated Bylaws (as amended as of May 31, 2022). (incorporated by reference to Exhibit 3.1 to the Registrant's Current Report on Form 8-K filed on June 1, 2022).
4.1	Indenture (including form of Note) by and among between Nikola Corporation, Nikola Subsidiary Corporation and U.S. Bank Trust Company, National Association, Wilmington Savings Fund Society, FSB, as trustee, dated April 11, 2023 August 21, 2023 (incorporated by reference to Exhibit 4.1 to the Registrant's Current Report on Form 8-K filed on April 14, 2023 August 21, 2023).
4.2	First Supplemental Indenture to Indenture dated April 11, 2023 (including Form of Note) by and among between Nikola Corporation, Nikola Subsidiary Corporation and U.S. Bank Trust Company, National Association, Wilmington Savings Fund Society, FSB, as trustee, dated June 23, 2023.
4.3	First Supplemental Indenture to Indenture dated June 1, 2022, by and among Nikola Corporation, Nikola Subsidiary Corporation and U.S. Bank Trust Company, National Association, as trustee, dated April 3, 2023 August 21, 2023 (incorporated by reference to Exhibit 4.2 to the Registrant's Current Report on Form 8-K filed on April 14, 2023 August 21, 2023).
4.4,4.3	Second Supplemental Indenture to Indenture dated June 1, 2022, by and among Nikola Corporation, Nikola Subsidiary Corporation and U.S. Bank Trust Company, National Association, as trustee, dated April 10, 2023 (incorporated by reference to Exhibit 4.3 to the Registrant's Current Report on Form 8-K filed on April 14, 2023).
4.5	Third Supplemental Indenture to Indenture dated June 1, 2022, by and among Nikola Corporation, Nikola Subsidiary Corporation and U.S. Bank Trust Company, National Association, as trustee, dated June 23, 2023.
4.6	Indenture (including form of Note) by and among Nikola Corporation, Nikola Subsidiary Corporation and U.S. Bank Trust Company, National Association, as trustee, dated June 23, 2023.
4.7	Second Supplemental Indenture (including form Form of Series B-2 A-2 Senior Convertible Note) by and between Nikola Corporation and Wilmington Savings Fund Society, FSB, as trustee, dated May 10, 2023 September 22, 2023 (incorporated by reference to Exhibit 4.2 to the Registrant's Current Report on Form 8-K filed on May 10, 2023 September 22, 2023).
#	Form of Amendment to Executive Employment Amended and Restated Equity Distribution Agreement by and between Nikola Corporation and Citigroup Global Markets Inc., as sales agent, dated August 4, 2023 (incorporated by reference to Exhibit 10.1 to the Registrant's Current Report on Form 8-K filed on April 28, 2023, August 4, 2023).
#	Form of Performance-Based Restricted Stock Unit Securities Purchase Agreement under by and between Nikola Corporation and the Nikola Corporation 2020 Stock Incentive Plan investors named therein, dated August 21, 2023 (incorporated by reference to Exhibit 10.210.1 to the Registrant's Current Report on Form 8-K filed on August 21, 2023).
#	2023) Nikola Corporation 2020 Stock Incentive Plan, as amended and restated on April 12, 2023.
#	Executive Employment Agreement by and between Nikola Corporation and Stephen J. Girskey dated August 4, 2023.
#	Executive Transition Services Agreement by and between Nikola Corporation and Michael Lohscheller, dated August 4, 2023.
#	Executive Employment Agreement by and between Nikola Corporation and Mary S. Chan, dated September 15, 2023 (incorporated by reference to Exhibit 10.1 to the Registrant's Current Report on Form 8-K filed on September 19, 2023).
#	Executive Employment Agreement by and between Nikola Corporation and Joseph S. Cappello, dated September 15, 2023 (incorporated by reference to Exhibit 10.1 to the Registrant's Current Report on Form 8-K filed on September 21, 2023).
31.1	Certification of Principal Executive Officer Pursuant to Rules 13a-14(a) and 15d-14(a) under the Securities Exchange Act of 1934, as Adopted Pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.
31.2	Certification of Principal Financial Officer Pursuant to Rules 13a-14(a) and 15d-14(a) under the Securities Exchange Act of 1934, as Adopted Pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.
^	Certification of Principal Executive Officer Pursuant to 18 U.S.C. Section 1350, as Adopted Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.
^	Certification of Principal Financial Officer Pursuant to 18 U.S.C. Section 1350, as Adopted Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.
101.INS	Inline XBRL Instance.
101.SCH	Inline XBRL Extension Calculation Linkbase.
101.CAL	Inline XBRL Taxonomy Extension Calculation Linkbase.

101.CAL	Inline XBRL Taxonomy Extension Calculation Linkbase.
101.DEF	Inline XBRL Taxonomy Extension Definition Linkbase.
101.LAB	Inline XBRL Taxonomy Extension Label Linkbase.
101.PRE	Inline XBRL Taxonomy Extension Presentation Linkbase.
104	Cover Page Interactive Data File (formatted as Inline XBRL).

Indicates management contract or compensatory plan or arrangement.

^ In accordance with Item 601(b)(32)(ii) of Regulation S-K and SEC Release No. 34-47986, the certifications furnished in Exhibits 32.1 and 32.2 hereto are deemed to accompany this Quarterly Report on Form 10-Q and will not be deemed "filed" for purposes of Section 18 of the Exchange Act or deemed to be incorporated by reference into any filing under the Exchange Act or the Securities Act except to the extent that the registrant specifically incorporates it by reference.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

NIKOLA CORPORATION

By: /s/ Michael Lohscheller Stephen J. Girskey

Michael Lohscheller Stephen J. Girskey

President and Chief Executive Officer

(Principal Executive Officer)

By: /s/ Anastasiya Pasterick

Anastasiya Pasterick

Chief Financial Officer

(Principal Financial and Accounting Officer)

Date: August 4, 2023 November 2, 2023

95 99

Exhibit 4.23.3

**CERTIFICATE OF AMENDMENT OF
THE SECOND AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION OF**

NIKOLA CORPORATION

as Nikola Corporation, a corporation organized and existing under the Company,

NIKOLA SUBSIDIARY CORPORATION,

as Guarantor

AND

U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION

as Trustee

FIRST SUPPLEMENTAL INDENTURE

June 23, 2023

FIRST SUPPLEMENTAL INDENTURE, dated as General Corporation Law of June 23, 2023 (this the State of Delaware (the "Supplemental Indenture Corporation"), among NIKOLA CORPORATION, a hereby certifies as follows:

1. The original Certificate of Incorporation of the Corporation was filed with the Secretary of State of Delaware corporation, on January 23, 2018 under the name VectolQ Acquisition Corp.

2. This amendment to the Second Amended and Restated Certificate of Incorporation of the Corporation as issuer (the set forth below has been duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware by the stockholders and directors of the Corporation.

3. Subsection A of ARTICLE IV of the Second Amended and Restated Certificate of Incorporation of the Corporation as presently in effect is amended and restated to read in its entirety as follows:

Company Classes of Stock). The total number of shares of all classes of capital stock that the Corporation shall have authority to issue is one billion seven hundred fifty million (1,750,000,000), NIKOLA SUBSIDIARY CORPORATION, a Delaware corporation, as guarantor (the " of which one billion six hundred million (1,600,000,000) shares shall be Common Stock, \$0.0001 par value per share ("Guarantor Common Stock"), and U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION of which one hundred fifty million (150,000,000) shares shall be Preferred Stock, \$0.0001 par value per share ("U.S. Bank Preferred Stock"), as trustee (the "Trustee"), to. The number of authorized shares of Common Stock or Preferred Stock may be increased or decreased (but not below the Indenture, dated as number of April 11, 2023 (the "Original Indenture" and, as amended, supplemented and otherwise modified shares thereof then outstanding) by this Supplemental Indenture, the "Indenture", among the Company, the Guarantor and the Trustee.

WHEREAS, the Company and the Guarantor have heretofore executed and delivered the Original Indenture, pursuant to which the Company issued its 8.00% / 11.00% Series B Convertible Senior PIK Toggle Notes due 2026 (the "Notes") and the Guarantor guaranteed the Notes;

WHEREAS, the Company has solicited consents (each a "Consent" and collectively the "Consents") from each affirmative vote of the Holders to amend, supplement and otherwise modify the Original Indenture and the Notes as set forth in Article II holders of this Supplemental Indenture (the "Amendments") upon the terms and subject to the conditions set forth in such Consents;

WHEREAS, Section 10.02 of the Original Indenture provides that the Company, the Guarantor and the Trustee may amend, supplement and otherwise modify the Original Indenture to make certain changes with the consent of the Holders of at least a majority of the aggregate principal amount then outstanding shares of Common Stock, without a vote of the Notes then outstanding and certain other changes with the consent of each Holder holders of the Notes then outstanding, including Preferred Stock, or of any series thereof, unless a vote of any such Preferred Stock holders is required pursuant to the release provisions established by the Board of Directors of the Note Guarantee Corporation (the "Board of any Guarantor Directors") in the resolution or resolutions providing for the issue of such Preferred Stock, and if such holders of such Preferred Stock are so entitled to vote thereon, then, except as provided may otherwise be set forth in the Indenture; certificate of incorporation of the Corporation, the only stockholder approval required shall be the affirmative vote of a majority of the voting power of the Common Stock and the Preferred Stock so entitled to vote, voting together as a single class."

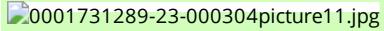
4. All other provisions of the Second Amended and Restated Certificate of Incorporation of the Corporation remain in full force and effect.

WHEREAS, IN WITNESS WHEREOF, the Company Corporation has received caused this Certificate of Amendment to be signed by its duly authorized Chief Legal Officer this 3rd day of August, 2023.

NIKOLA CORPORATION

By: /s/ Britton M. Worthen
Britton M. Worthen, Chief Legal Officer

Exhibit 10.4



August 4, 2023

Stephen J. Girsky

Re: Executive Employment Arrangement

Dear Steve:

I am pleased to offer you the position of President and ~~delivered~~ Chief Executive Officer of Nikola Corporation (the "Company"), reporting to the ~~Trustee~~ written evidence of the Consents from each of the Holders of the Notes outstanding to effect the Amendments;

WHEREAS, the Company's Board of Directors (the "Board"). Effective as of your employment start date, you will no longer serve as Chairman of the Company by resolutions adopted on June 21, 2023 has duly authorized, on behalf ~~Board~~, but you will continue to serve as a member of the Company, ~~Board~~. Your responsibilities include, but are not limited to, such employment duties as are usual and customary for this Supplemental Indenture;

WHEREAS, in connection ~~position~~ and which are commensurate with the ~~execution~~ duties, authorities, and delivery ~~responsibilities~~ of this Supplemental Indenture, persons in similar capacities in similar sized companies. At the ~~Trustee~~ has received an Officer's Certificate and an Opinion of Counsel as contemplated by Section 10.05 of the Original Indenture; and

WHEREAS, Company's request, you shall serve the Company has requested that and/or its subsidiaries and affiliates in other capacities in addition to the ~~Trustee~~ execute and deliver this Supplemental Indenture and has satisfied all requirements necessary to make this Supplemental Indenture a valid instrument ~~foregoing~~, consistent with expectations for your position.

The terms of your employment are as follows:

Employment Period. Your anticipated start date is on or about August 4, 2023. Your employment shall continue indefinitely until terminated in accordance with its terms, the terms of this Agreement. Notwithstanding the foregoing, your employment is terminable at will by the Company or by you at any time (for any reason or for no reason), subject to the termination provisions of this Agreement.

WITNESSETH:

NOW THEREFORE, each party agrees as follows Relocation. To assist you with your relocation to the greater Phoenix, Arizona area within two months of your start date, the Company will provide a one-time taxable miscellaneous bonus of \$20,000 payable with your first regular paycheck; grossed-up payment for the benefit ~~loading~~, shipping and unloading of your goods from your current home to your new one after receipts for those services are obtained by the Company; assistance with back-and-forth travel to and from your current residence to the Company's headquarters in Phoenix, Arizona for up to two (2) months from your official start date with the Company, including airfare, lodging and reasonable meal expenses; and home buying or apartment search assistance through a local realty firm. You agree to repay in full all the assistance outlined in this Relocation section if you leave the Company voluntarily (and not pursuant to an Involuntary Termination (as defined below), death or disability) prior to your one-year employment anniversary with the Company.

Annual Salary. Your annual salary will be \$1,000,000, paid bi-weekly less payroll deductions and all required withholdings.

Annual Bonus. You have indicated your interest in declining participation in any annual cash bonus program provided by the Company, without regard to your eligibility in any such program. Your signature on this Agreement confirms your election.

Stock Awards. You will be eligible to receive stock awards under the Company's 2020 Stock Incentive Plan (the "Plan") as in effect from time to time, subject to approval by the Board and in line with your role and the rubric for other named executive officers of the other parties Company. The terms and for conditions of each stock award will be set

forth in separate award agreements in forms prescribed by the equal Company (each, an "Award Agreement"), and ratable benefit all shares underlying the respective awards will contain the right to receive dividend equivalents, if any, subject to the

same vesting conditions as the shares underlying the stock awards. The stock awards shall be governed in all respects by the terms and conditions of the Holders' Plan and the applicable Award Agreement.

ARTICLE I

DEFINITIONS

Section 1.1. *Definitions in this Supplemental Indenture.* Unless otherwise specified herein or You are eligible to receive the context otherwise requires:

- (a) a term defined in following new hire stock awards, subject to approval by the Original Indenture has the same meaning when used in this Supplemental Indenture unless the definition of such term is amended or supplemented pursuant to this Supplemental Indenture;
- (b) the terms defined in this Article and in this Supplemental Indenture include the plural as well as the singular;
- (c) unless otherwise stated, a reference to a Section or Article is to a Section or Article of this Supplemental Indenture; and
- (d) the titles and headings of the Articles and Sections of this Supplemental Indenture have been inserted for convenience of reference only, are not Board, to be considered a part hereof, and shall in granted no way modify or restrict any of the terms or provisions hereof.

ARTICLE II

AMENDMENTS TO THE ORIGINAL INDENTURE

Section 2.1. Section 4.11 of the Original Indenture is hereby amended and restated in its entirety to read as follows:

later than August 11, 2023:

Section 4.11. • Limitation on Subsidiary Guarantees Restricted Stock Unit Award (RSUs). The Company will award you 550,000 RSUs which will vest in equal annual tranches on each of the first two anniversaries of the date you become President and Chief Executive Officer, subject to your continuous "Service" (as defined in the Plan).

- Performance Stock Unit Award (PSUs). The Company will award you 1,000,000 PSUs, reflecting the target number of shares assuming achievement at 100% (the "Target Amount"). The number of PSUs that may ultimately be paid out to you will range from 0% to 200% of the Target Amount as determined (i) based upon the Company's achievement of certain performance goals occurring during the Performance Period as outlined in the forthcoming award agreement, and (ii) subject to your continuous Service through the performance period. The performance goals and terms and conditions of the award are consistent with those agreed upon and approved by the Board at the Company's April 2023 board meeting and awarded to all other named executive officers.

In the event of a Change in Control (as defined in the Plan), the achievement of the performance conditions for performance-based stock awards (each a "Performance Award") will be based on the Company's performance through the closing of such Change in Control. The amount of the Performance Award that would have been earned based on this measurement will be converted to time-vested restricted stock units immediately prior to such Change in Control (the "Converted Awards"). If the Converted Awards are assumed, substituted or otherwise continued by the successor corporation (or a parent or subsidiary thereof), all vesting restrictions applicable to the Converted Awards will lapse on the earlier of (i) the final day of the applicable performance period subject to your continued employment with the successor corporation (or a parent or subsidiary thereof) through such date, at which time such Converted Awards will be settled, and (ii) subject to your compliance with the Severance Conditions (as defined below), the date of your Involuntary Termination of employment with the successor corporation (or a parent or subsidiary thereof). All Converted Awards that are not assumed, substituted, or otherwise continued by the successor corporation (or a parent or subsidiary thereof) will fully vest and will be settled immediately prior to the consummation of such Change in Control.

Benefits. You (and your spouse and/or eligible dependents to the extent provided in the applicable plans and programs) are eligible to participate in and be covered under the health, welfare and financial benefit plans and programs maintained by the Company for the benefit of its Subsidiaries, directly or indirectly, to Guarantee any Debt, other than (a) Guarantees of (i) Notes permitted by Section 2.01 of this Indenture (so long as such Subsidiary has Guaranteed all Notes issued under this Indenture), (ii) any notes issued to employees, pursuant to that certain Indenture by the terms of such plans, on the same terms and among conditions as those applicable to similarly situated executives.

Detailed descriptions of the Company's benefit plans are available and will be provided to you upon request. Your eligibility to receive such benefits will be subject in each case to the generally applicable terms and conditions for the benefits in question and to the determinations of any person or committee administering such benefits. The Company the guarantors party thereto may modify or terminate any benefits plan or program from time to time in its sole discretion.

Expenses. You are entitled to receive prompt reimbursement for all reasonable business expenses incurred in connection with the performance of your duties in accordance with the policies, practices, and U.S. Bank, procedures of the Company.

Vacation. You are entitled to paid vacation in accordance with the policies, practices, and procedures of the Company.

Indemnification/Legal Fees. The Company agrees that you will be entitled to the same indemnification rights as trustee, dated the Company grants to other officers of the Company, as of June 1, 2022, as amended and as may be amended, supplemented or otherwise modified in effect from time to time. The Company will maintain a directors and officers liability policy covering you with coverage comparable or equal to that provided to other officers of the Company. In the event of any dispute over your entitlement to payments or benefits hereunder, the Company shall advance you an amount equal to your monthly legal fees incurred in connection with such dispute until there is a final non-appealable decision by a court that you are not entitled to such payment or benefit.

Termination of Employment. In the event of an Involuntary Termination of your employment at any time, and (iii) any notes issued pursuant subject to that certain Indenture by and among (i) your execution of a general release of claims in favor of the Company in substantially the guarantors party thereto from time form attached as Exhibit A (the "Release"), (ii) your non-revocation of the Release and it becoming effective within sixty (60) days following the date of your termination of employment (the "Termination Date"), and (iii) your faithful observance of the terms of such Release (such conditions, the "Severance Conditions"), then you shall be entitled to time the following severance benefits (the "Severance Benefits"):

- Severance Payment. The Company will pay you a cash lump sum in an amount equal to \$2,600,000, less applicable withholding.
- Stock Awards.
 - o Restricted Stock, Restricted Stock Units and U.S. Bank, Stock Options. All outstanding restricted stock awards, restricted stock units (other than Performance Awards but including the Converted Awards) and stock options will immediately vest in full. Unexercised stock options will remain exercisable for three years following your Termination Date.
 - o Performance Awards. Service will be deemed to have been satisfied upon an Involuntary Termination. All outstanding PSUs will vest and be settled at the end of the performance period based on final actual performance.
- Benefits Continuation. The Company will pay to you a cash lump sum equal in value to 18 months of COBRA benefits coverage, less applicable withholding.

The cash Severance Benefits will be paid on the first regular payroll date following the date that your Release becomes effective, subject to compliance with Section 409A of the Internal Revenue Code of 1986, as trustee, dated as of June 23, 2023 as may be amended supplemented or otherwise modified from time to time, (b) Debt secured by a Lien permitted by ("Section 4.10, so long as such Subsidiary has Guaranteed the Notes (for 409A").

For the avoidance of doubt, if Section 4.10 you independently and unilaterally decide to end your employment at the Company without Good Reason, or if you are terminated for Cause, or if your employment is no longer terminated due to your death or disability, you will not be entitled to receive any Severance Benefits.

You may terminate your employment with the Company at any time and for any reason whatsoever simply by notifying the Company. Likewise, the Company may terminate your employment at any time, with or without cause or advance notice. Your employment at-will status can only be modified in effect a written agreement signed by you and by an authorized officer of the Company.

Pro-Ration of 2023 Non-Employee Director Compensation. Pursuant to the terms of the Company's non-employee director program, in your capacity as a result non-employee director and as Chairman of the second sentence thereof, Board, on April 24, 2023, you were granted an award of 175,000 restricted stock units with a grant date fair value of \$350,000 (the "2023 Award") under the Plan and subject to the terms of an award agreements in the form prescribed by the Company. By your signature on this clause (b) shall Agreement, you agree that the number of RSUs subject to the 2023 Award will be changed prorated to read "Debt secured by reflect your period of service as a Lien, so long as such Subsidiary has Guaranteed non-employee director from April 24, 2023, to August 4, 2023. Except with respect to the Notes"), number of restricted stock units subject to the 2023 Award, the 2023 Award will continue to be administered in accordance with the Plan and (c) Guarantees pursuant to contractual obligations existing as the terms of the date 2023 Award and will vest subject to your continued service with the Company as CEO and President through the first anniversary of the Investment Agreement (which, for the avoidance of doubt, shall include any Guarantee of Debt of Nikola Iveco Europe GmbH).

Section 2.2. Romeo Power, Inc. (a) is hereby released as a Guarantor under the Indenture, its Note Guarantee and the notation of such Note Guarantee on the Notes, if any, and (b) shall be deemed to be an Immaterial Subsidiary.

ARTICLE III

MISCELLANEOUS

Section 3.1. *Operativeness of Amendments.* This Supplemental Indenture will become effective immediately upon its execution and delivery by the parties hereto.grant date.

Section 3.2. *409ARatification.* Notwithstanding anything to the contrary in this Agreement, no compensation or benefits, including any Severance Benefits, stock awards, consulting payments or other benefits payable due to termination, shall be paid to you during the six-month period following your termination if the Company determines that paying such amounts would be a prohibited distribution under Section 409A. If the payment of Original Indenture any such amounts is so delayed, then on the first day of the seventh month following termination (or such earlier date upon which such amount can be paid under Section 409A without resulting in a prohibited distribution) the Company shall pay to you a lump- sum amount equal to the cumulative amount that would have otherwise been payable during such period. In addition, to the extent required in order to comply with Section 409A, you shall not be considered to have terminated employment with the Company for purposes of this Agreement and no payment of such amounts due pursuant to your termination shall be due until you would be considered to have incurred a "separation from service"

from the Company within the meaning of Section 409A. Each such amount which constitutes deferred compensation subject to Section 409A shall be construed as a separate identified payment for purposes of Section 409A. If the period during which you have discretion to execute or revoke the Release straddles two calendar years, then the Company will make the payment of amounts that are subject to Section 409A and contingent on the effectiveness of such Release starting in the second of such years regardless of which year you actually deliver the Release. You may not, directly or indirectly, designate the calendar year of payment of any amounts subject to Section 409A. The intent of the parties is that the payments and benefits under this Agreement comply with or be exempt from Section 409A and, accordingly, to the maximum extent permitted, this Agreement shall be interpreted to be exempt from or in compliance therewith.

To the extent that any payments or reimbursements provided to you under this Agreement are deemed to constitute compensation to which Treasury Regulation Section 1.409A-3(i)(1)(iv) would apply, such amounts shall be paid or reimbursed reasonably promptly, but not later than December 31 of the year following the year in which the expense was incurred. The amount of any such payments eligible for reimbursement in one year shall not affect the payments or expenses that are eligible for payment or reimbursement in any other taxable year, and your right to such payments or reimbursement of any such expenses shall not be subject to liquidation or exchange for any other benefit.

Work Product. As a condition of employment, you will be expected to abide by Company rules and policies and comply with the Employee Proprietary Information and Inventions Assignment Agreement (PIIA), which prohibits unauthorized use or disclosure of Company proprietary information.

Confidentiality. In your work for the Company, you will be expected not to use or disclose any confidential information, including trade secrets, of any former employer or other person to whom you have an obligation of confidentiality. Rather, you will be expected to use only that information which is generally known and used by persons with training and experience comparable to your own, which is common knowledge in the industry or otherwise legally in the public domain, or which is otherwise provided or developed by the Company.

You agree that you will not bring onto Company premises any unpublished documents or property belonging to any former employer or other person to whom you have an obligation of confidentiality. You represent that you have disclosed to the Company any contract you have signed that may restrict your activities on behalf of the Company. You represent further that you have the ability to perform the essential functions of your job with or without reasonable accommodations.

This Agreement, together with its attached exhibits, forms the complete and exclusive statement of your employment agreement with the Company. The employment terms in this Agreement supersede any other agreements or promises made to you by anyone, whether oral or written. Changes in your employment terms, other than those changes expressly reserved to the Company's discretion in this Agreement, require a written modification signed by an authorized officer of the Company and by you.

Successors/Assigns. The Original Indenture, as supplemented by Company shall assign this Supplemental Indenture, is in Agreement to any successor to all respects ratified and confirmed, and this Supplemental Indenture shall be deemed part or substantially all of the Original Indenture in the manner business and to the extent herein and therein provided.

Section 3.3. *No Responsibility for Recitals, Etc.* The recitals contained herein shall be taken as the statements assets of the Company and the Trustee assumes no responsibility for Company shall require successor to expressly assume and agree to in the correctness of the same. The Trustee makes no representations as same manner and to the validity or sufficiency of this Supplemental Indenture. All of same extent that the provisions contained in the Original Indenture in respect of the rights, privileges, indemnities, immunities, powers, and duties of the Trustee shall Company would be applicable in respect of this Supplemental Indenture as fully and with like force and effect as though set forth in full herein, required to perform it if no such succession had taken place.

Section 3.4. Governing Law. THIS SUPPLEMENTAL INDENTURE AND AND The terms of this Agreement and the resolution of any dispute as to the meaning, effect, performance or validity of this Agreement or arising out of, related to, or in any way connected with, this Agreement, your employment with the Company (or termination thereof) or any other relationship between you and the Company (a "Dispute") will be governed by the laws of the State of Arizona, without giving effect to the principles of conflict of laws. To the extent not subject to arbitration as described below, you and the Company consent to the exclusive jurisdiction of, and venue in, the state courts in State of Arizona (or in the event of exclusive federal jurisdiction, the courts of the District of Arizona in connection with any Dispute or any claim related to any Dispute).

Except as prohibited by law, you agree that any Dispute between you and the Company (or between you and any officer, director, employee or affiliates of the Company, each of whom is hereby designated a third party beneficiary of this Agreement regarding arbitration) will be resolved through binding arbitration in Maricopa

County, Arizona under the rules of the American Arbitration Association and the Arbitration Rules set forth in Arizona Rules of Civil Procedure. Nothing in this arbitration provision is intended to limit any right you may have to file a charge with or obtain relief from the National Labor Relations Board or any other state or federal agency. You agree that such arbitration shall be conducted on an individual basis only, not a class, collective or representative basis, and hereby waive any right to bring class-wide, collective or representative claims before any arbitrator or in any forum. THE PARTIES UNDERSTAND THAT BY AGREEING TO ARBITRATE DISPUTES THEY ARE WAIVING ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS SUPPLEMENTAL INDENTURE, SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK (WITHOUT REGARD TO THE CONFLICTS OF LAWS PROVISIONS THEREOF) A JURY TRIAL. This arbitration provision is not intended to modify or limit substantive rights or the remedies available to the parties, including the right to seek interim relief, such as injunction or attachment, through judicial process, which shall not be deemed a waiver of the right to demand and obtain arbitration.

Please sign and date this Agreement if you wish to commence employment at the Company under the terms described above and return it to . For the purposes of this Agreement, a facsimile or electronic signature shall serve as an original.

Certain Definitions. Defined terms in this Agreement are as follows:

Involuntary Termination. Involuntary Termination shall mean a termination of employment by the Company without Cause or by you with Good Reason.

Good Reason. Good Reason shall mean a resignation by you as a result of (i) an adverse change in title, authorities or responsibilities that diminishes your position; (ii) a change in your reporting relationship such that you are no longer reporting to the Board; (iii) a material reduction in your base salary; or (iv) a material breach by the Company of any of its obligations under this Agreement or any other written agreement between the Company and you. A resignation for Good Reason will not be deemed to have occurred unless you give the Company written notice of the condition within ninety (90) days after the condition comes into existence and the Company fails to remedy the condition within thirty (30) days after receiving your written notice.

Cause. Cause shall mean any of the following: (i) your repeated failure to follow the lawful instructions of the Board consistent with your title following written notice of any alleged failure and 15 days to cure such failure; (ii) your material violation of any written Company policy that has been provided to you; (iii) your commission of any act of fraud, embezzlement or any other material misconduct that has caused or is reasonably expected to result in injury to the Company; (iv) your unauthorized use or disclosure of any proprietary information or trade secrets of the Company or any other party to whom you owe an obligation of nondisclosure as a result of your relationship with the Company; or (v) your material breach of any of your material obligations under any written agreement or covenant with the Company.

Section 3.5. Execution in Counterparts. This Supplemental Indenture may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute but one and the same instrument. The exchange of copies of this this Supplemental Indenture and of signature pages by facsimile, PDF or other electronic transmission shall constitute effective execution and delivery of this Supplemental Indenture as to the parties hereto and may be used in lieu of the original Supplemental Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile, PDF or such other electronic means shall be deemed to be their original signatures for all purposes. Unless otherwise provided in this Supplemental Indenture or in any Note, the words "execute," "execution," "signed" and "signature" and words of similar import used in or related to any document to be signed in connection with this Supplemental Indenture or any of the transactions contemplated hereby (including amendments, waivers, consents and other modifications) shall be deemed to include electronic signatures and the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature in ink or the use of a paper-based recordkeeping system, as applicable, to the fullest extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act and any other similar state laws based on the Uniform Electronic Transactions Act; provided that, notwithstanding anything herein to the contrary, the Trustee is not under any obligation to agree to accept electronic

signatures in any form or in any format unless expressly agreed to by the Trustee pursuant to procedures approved by the Trustee.

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[*Remainder of page intentionally left blank*]

IN WITNESS WHEREOF, I am delighted to confirm the parties hereto have caused terms of this Supplemental Indenture Agreement to be duly executed as you on behalf of the day Company. We look forward to your favorable reply and year first above written, to building a successful Company together.

Sincerely,

NIKOLA
CORPORATION

By:

/s/ Anastasiya
Pasterick

Name:
Anastasiya
Pasterick
Title: Chief
Financial Officer

NIKOLA SUBSIDIARY CORPORATION,
as Guarantor

By:

/s/ Anastasiya
Pasterick

Name:
Anastasiya
Pasterick
Title: Chief
Financial Officer

U.S. BANK TRUST COMPANY, NATIONAL
ASSOCIATION, as Trustee

By:

/s/ Brandon
Bonfig

Name: Brandon
Bonfig
Title: Vice
President

[*Signature Page to First Supplemental Indenture*]

NIKOLA CORPORATION,
as the Company,
NIKOLA SUBSIDIARY CORPORATION,
as Guarantor
AND
U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION
as Trustee
THIRD SUPPLEMENTAL INDENTURE
June 23, 2023
8.00% / 11.00% Convertible Senior PIK Toggle Notes due 2026

THIRD SUPPLEMENTAL INDENTURE, dated as of June 23, 2023 (this "Supplemental Indenture"), among NIKOLA CORPORATION, a Delaware corporation, as issuer (the "Company"), NIKOLA SUBSIDIARY CORPORATION, a Delaware corporation, as guarantor (the "Guarantor"), and U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION ("U.S. Bank"), as trustee (the "Trustee"), to the Indenture, dated as of June 1, 2022, as amended and supplemented by that certain First Supplemental Indenture, dated as of April 3, 2022 and that certain Second Supplemental Indenture, dated as of April 10, 2023 (the "Original Indenture" and, as amended, supplemented and otherwise modified by this Supplemental Indenture, the "Indenture"), among the Company, the Guarantor and the Trustee.

WHEREAS, the Company and the Guarantor have heretofore executed and delivered the Original Indenture, pursuant to which the Company issued its 8.00% / 11.00% Convertible Senior PIK Toggle Notes due 2026 (the "Notes") and the Guarantor guaranteed the Notes;

WHEREAS, the Company has solicited consents (each a "Consent" and collectively the "Consents") from each of the Holders to amend, supplement and otherwise modify the Original Indenture and the Notes as set forth in Article II of this Supplemental Indenture (the "Amendments") upon the terms and subject to the conditions set forth in such Consents;

WHEREAS, Section 10.02 of the Original Indenture provides that the Company, the Guarantor and the Trustee may amend, supplement and otherwise modify the Original Indenture to make certain changes with the consent of the Holders of at least a majority of the aggregate principal amount of the Notes then outstanding and certain other changes with the consent of each Holder of the Notes then outstanding, including the release of the Note Guarantee of any Guarantor except as provided in the Indenture;

WHEREAS, the Company has received and delivered to the Trustee written evidence of the Consents from each of the Holders of the Notes outstanding to effect the Amendments;

WHEREAS, the Board of Directors of the Company by resolutions adopted on June 21, 2023 has duly authorized, on behalf of the Company, this Supplemental Indenture;

WHEREAS, in connection with the execution and delivery of this Supplemental Indenture, the Trustee has received an Officer's Certificate and an Opinion of Counsel as contemplated by Section 10.05 of the Original Indenture; and

WHEREAS, the Company has requested that the Trustee execute and deliver this Supplemental Indenture and has satisfied all requirements necessary to make this Supplemental Indenture a valid instrument in accordance with its terms.

WITNESSETH:

NOW THEREFORE, each party agrees as follows for the benefit of the other parties and for the equal and ratable benefit of the Holders:

ARTICLE I

DEFINITIONS

Section 1.1. *Definitions in this Supplemental Indenture.* Unless otherwise specified herein or the context otherwise requires:

- (a) a term defined in the Original Indenture has the same meaning when used in this Supplemental Indenture unless the definition of such term is amended or supplemented pursuant to this Supplemental Indenture;
- (b) the terms defined in this Article and in this Supplemental Indenture include the plural as well as the singular;
- (c) unless otherwise stated, a reference to a Section or Article is to a Section or Article of this Supplemental Indenture; and
- (d) the titles and headings of the Articles and Sections of this Supplemental Indenture have been inserted for convenience of reference only, are not to be considered a part hereof, and shall in no way modify or restrict any of the terms or provisions hereof.

ARTICLE II

AMENDMENTS TO THE ORIGINAL INDENTURE

Section 2.1. Section 4.11 of the Original Indenture is hereby amended and restated in its entirety to read as follows:

Section 4.11. *Limitation on Subsidiary Guarantees.* The Company will not permit any of its Subsidiaries, directly or indirectly, to Guarantee any Debt, other than (a) Guarantees of (i) Notes permitted by Section 2.01 of this Indenture (so long as such Subsidiary has Guaranteed all Notes issued under this Indenture), (ii) any notes issued pursuant to that certain Indenture by and among the Company, the guarantors party thereto from time to time and U.S. Bank, as trustee, dated as of April 11, 2023, as may be amended, supplemented or otherwise modified from time to time, and (iii) any notes issued pursuant to that certain Indenture by and among the Company, the guarantors party thereto from time to time and U.S. Bank, as trustee, dated as of June 23, 2023 as may be amended, supplemented or otherwise modified from time to time, (b) Debt secured by a Lien permitted by Section 4.10, so long as such Subsidiary has Guaranteed the Notes (for the avoidance of doubt, if Section 4.10 is no longer in effect as a result of the second sentence thereof, this clause (b) shall be changed to read "Debt secured by a Lien, so long as such Subsidiary has Guaranteed the Notes"), and (c) Guarantees pursuant to contractual obligations existing as of the date of the Investment Agreement (which, for the avoidance of doubt, shall include any Guarantee of Debt of Nikola Ivec Europe GmbH).

Section 2.2. Romeo Power, Inc. (a) is hereby released as a Guarantor under the Indenture, its Note Guarantee and the notation of such Note Guarantee on the Notes, if any, and (b) shall be deemed to be an Immaterial Subsidiary.

ARTICLE III

MISCELLANEOUS

Section 3.1. *Operativeness of Amendments.* This Supplemental Indenture will become effective immediately upon its execution and delivery by the parties hereto.

Section 3.2. *Ratification of Original Indenture.* The Original Indenture, as supplemented by this Supplemental Indenture, is in all respects ratified and confirmed, and this Supplemental Indenture shall be deemed part of the Original Indenture in the manner and to the extent herein and therein provided.

Section 3.3. *No Responsibility for Recitals, Etc.* The recitals contained herein shall be taken as the statements of the Company, and the Trustee assumes no responsibility for the correctness of the same. The Trustee makes no representations as to the validity or sufficiency of this Supplemental Indenture. All of the provisions contained in the Original Indenture in respect of the rights, privileges, indemnities, immunities, powers, and duties of the Trustee shall be applicable in respect of this Supplemental Indenture as fully and with like force and effect as though set forth in full herein.

Section 3.4. *Governing Law.* THIS SUPPLEMENTAL INDENTURE AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS SUPPLEMENTAL INDENTURE, SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK (WITHOUT REGARD TO THE CONFLICTS OF LAWS PROVISIONS THEREOF).

Section 3.5. *Execution in Counterparts.* This Supplemental Indenture may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute but one and the same instrument. The exchange of copies of this Supplemental Indenture and of signature pages by facsimile, PDF or other electronic transmission shall constitute effective execution and delivery of this Supplemental Indenture as to the parties hereto and may be used in lieu of the original Supplemental Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile, PDF or such other electronic means shall be deemed to be their original signatures for all purposes. Unless otherwise provided in this Supplemental Indenture or in any Note, the words "execute," "execution," "signed" and "signature" and words of similar import used in or related to any document to be signed in connection with this Supplemental Indenture or any of the transactions contemplated hereby (including amendments, waivers, consents and other modifications) shall be deemed to include electronic signatures and the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature in ink or the use of a paper-based recordkeeping system, as applicable, to the fullest extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act and any other similar state laws based on the Uniform Electronic Transactions Act; provided that, notwithstanding anything herein to the contrary, the Trustee is not under any obligation to agree to accept electronic signatures in any form or in any format unless expressly agreed to by the Trustee pursuant to procedures approved by the Trustee.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed as of the day and year first above written.

BY:

/s/ Steven M. Shindler

NIKOLA
CORPORATION Name: Steven
M. Shindler
For the Board of Directors

By:

/s/ Anastasiya Pasterick

Name: Anastasiya
Pasterick

Title: Chief Financial
Officer

Accepted:

/s/ Stephen J. Girsky
Stephen J. Girsky

NIKOLA SUBSIDIARY CORPORATION,

as Guarantor

By:

/s/ Anastasiya Pasterick
Name: Anastasiya
Pasterick
Title: Chief Financial
Officer

U.S. BANK TRUST COMPANY, NATIONAL
ASSOCIATION, as Trustee

By:

/s/ Brandon Bonfig
Name: Brandon Bonfig
Title: Vice President

[Signature Page to Third Supplemental Indenture]

Attachments: *Exhibit A - Form Severance Agreement and Release*
NIKOLA CORPORATION,

as the Company,

THE GUARANTORS PARTY HERETO FROM TIME TO TIME,

as Guarantors

AND

U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION

as Trustee

INDENTURE

Dated as of June 23, 2023

8.00% / 8.00% Series C Convertible Senior PIK Toggle Notes due 2026

Employee Proprietary Information and Inventions Assignment Agreement

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INDENTURE, dated as of June 23, 2023 among NIKOLA CORPORATION, a Delaware corporation, as issuer (the "Company", as more fully set forth in Section 1.01), the Guarantors party hereto from time to time and U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION, a national banking association organized under the laws of the United States, as trustee (the "Trustee", as more fully set forth in Section 1.01).

WITNESSETH:

WHEREAS, for its lawful corporate purposes, the Company has duly authorized the issuance of its 8.00% / 8.00% Series C Convertible Senior PIK Toggle Notes due 2026 (the "Notes"), and in order to provide the terms and conditions upon which the Notes are to be authenticated, issued and delivered, the Company has duly authorized the execution and delivery of this Indenture;

WHEREAS, the Form of Note, the certificate of authentication to be borne by each Note, the Form of Notice of Conversion, the Form of Fundamental Change Repurchase Notice and the Form of Assignment and Transfer to be borne by the Notes are to be substantially in the forms hereinafter provided;

WHEREAS, the Notes will be guaranteed on a senior basis by the Guarantors party hereto and each of the Company's existing and future Domestic Subsidiaries other than any Non-Guarantor Subsidiary to the extent required herein, and each of the Guarantors party hereto has duly authorized the execution and delivery of this Indenture and the issuance of its Note Guarantee; and

WHEREAS, all acts and things necessary to make the Notes, when executed by the Company and authenticated and delivered by the Trustee or a duly authorized authenticating agent, as in this Indenture provided, the valid, binding and legal obligations of the Company and

the Guarantors, and this Indenture a valid agreement according to its terms, have been done and performed, and the execution of this Indenture and the issuance hereunder of the Notes and the Note Guarantees have in all respects been duly authorized.

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That in order to declare the terms and conditions upon which the Notes are, and are to be, authenticated, issued and delivered, and in consideration of the premises and of the purchase and acceptance of the Notes by the Holders thereof, the Company and the Guarantors party hereto covenant and agree with the Trustee for the equal and proportionate benefit of the respective Holders from time to time of the Notes (except as otherwise provided below), as follows:

ARTICLE 1 EXHIBIT A

DEFINITIONS Severance Agreement and Release

Section 1.01.1. Definitions. Release of Claims. The terms defined in exchange for receipt of the severance benefits (the "Severance Benefits") described in this Section 1.01 (except as herein otherwise expressly provided or unless the context otherwise requires) for all purposes of this Indenture *<insert name>*'s ("Executive") Employment Agreement dated [], 2023 (the "Employment Agreement"), Executive hereby releases and of any indenture supplemental hereto shall have the respective meanings specified in this Section 1.01. The words "herein," "hereof," "hereunder," discharges and words of similar import refer to this Indenture as a whole and covenants not to any particular Article, Section sue Nikola Corporation (the "Company"), its subsidiaries, parents, or other subdivision. The terms defined in this Article include the plural affiliated corporations, past and present, and each of them, as well as the singular.

"Additional Interest" means all amounts, if each of its and their assignees, successors, directors, officers, stockholders, partners, representatives, insurers, attorneys, agents or employees, past or present, or any payable pursuant to Section 4.06(d) of them (individually and Section 6.03, as applicable).

"Affiliate" of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, "control," when used collectively, "Releasees", from and with respect to any specified Person means the power to direct or cause the direction of the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms "controlling" and "controlled" have meanings correlative to the foregoing. Notwithstanding anything to the contrary herein, the determination of whether one Person is an "Affiliate" of another Person for purposes of this Indenture shall be made based on the facts at the time such determination is made or required to be made, as the case may be, hereunder.

"Agreed Guarantee Principles" shall have the meaning specified in Section 13.04.

"April 2023 Indenture" shall have the meaning specified in the definition of the term **"Authorized Share Effective Date"**.

"Authorized Share Effective Date" means the date on which the Company has amended its certificate of incorporation to increase the number of authorized shares of Common Stock to allow for the reservation of at least such number of shares of Company Common Stock as needed upon initial conversion of all 8.00% / 11.00% Convertible Senior PIK Toggle Notes due 2026 of the Company issued pursuant to that certain Indenture, dated as of June 1, 2022 (as amended, supplemented or otherwise modified from time to time, the **"June 2022 Indenture"**), by and among the Company, the guarantors named therein, and U.S. Bank Trust Company, National Association, as trustee, all 8.00% / 11.00% Series B Convertible Senior PIK Toggle Notes due 2026 of the Company issued pursuant to that certain Indenture, dated as of April 11, 2023 (as amended, supplemented or otherwise modified from time to time, the **"April 2023 Indenture"** and, together with the June 2022 Indenture, the **"Existing Indentures"**), by and among the Company, the guarantors named therein, and U.S. Bank Trust Company, National Association, as trustee, and all Notes.

"Bid Solicitation Agent" means the Company claims, agreements, obligations, demands and causes of action, known or the Person appointed by the Company to solicit bids for the Trading Price of the Notes in accordance with Section 14.01(b)(i). The

Company shall initially act as the Bid Solicitation Agent, but the Company may appoint another Person as the Bid Solicitation Agent without prior notice to the Holders.

“Board of Directors” means the board of directors of the Company unknown, suspected or a committee of such board duly authorized to act for it hereunder.

“Board Resolution” means a copy of a resolution certified by the Secretary or an Assistant Secretary of the Company to have been duly adopted by the Board of Directors, and to be in full force and effect on the date of such certification, and delivered to the Trustee.

“Business Day” means, with respect to any Note, any day other than a Saturday, a Sunday or a day on which the Federal Reserve Bank of New York is authorized or required by law or executive order to close or be closed.

“Called Notes” means Notes called for redemption pursuant to Article 16.

“Capital Lease” means, with respect to any Person, any lease of any property which, in conformity with GAAP, is required to be capitalized on the balance sheet of such Person.

“Capital Stock” means, for any entity, any and all shares, interests, rights to purchase, warrants, options, participations or other equivalents unsuspected, arising out of or interests in (however designated) stock issued by that entity.

“Capitalization Amount” means, for any Interest PIK Date, an amount per Note equal way connected with events, acts, conduct, or omissions occurring at any time prior to the interest accrued on the principal amount of such Note as of the immediately preceding Interest Payment Date (or, if there is no immediately preceding Interest Payment Date, the interest accrued on the Initial Principal Amount) and not paid in cash, calculated at the Interest Rate on the principal amount of such Note for which interest is not paid in cash for the period from, and including, such immediately preceding Interest Payment Date (or, if there is no immediately preceding Interest Payment Date, from, and including the issue date of such Notes or such other date from which such Note bears interest as stated on such Note) to, but excluding, such Interest PIK Date.

“Capitalization Method” shall have the meaning specified in Section 2.03(d)(i).

“Capitalized Principal Amount” means, for any date, the principal amount per Note equal to the Initial Principal Amount of such Note, as increased on each Interest PIK Date occurring on or prior to such date by the Capitalization Amount for such Interest PIK Date, if any. When the term “principal amount” of any Note is used herein, such references shall be deemed to be references to the Capitalized Principal Amount of such Note, unless the context otherwise requires.

“Cash Interest Rate” means 8.00% per annum.

“Cash Method” shall have the meaning specified in Section 2.03(d)(i).

“Cash Settlement” shall have the meaning specified in Section 14.02(a).

"Change in Control Transaction" means any transaction or event that constitutes a Fundamental Change (as defined below and determined after giving effect to any exceptions to or exclusions from such definition) under clauses (a), (b) or (c) of the definition thereof.

"Clause A Distribution" shall have the meaning specified in Section 14.04(c).

"Clause B Distribution" shall have the meaning specified in Section 14.04(c).

"Clause C Distribution" shall have the meaning specified in Section 14.04(c).

"close of business" means 5:00 p.m. (New York City time).

"Combination Settlement" shall have the meaning specified in Section 14.02(a).

"Commission" means the U.S. Securities and Exchange Commission.

"Common Equity" of any Person means Capital Stock of such Person that is generally entitled (a) to vote in the election of directors of such Person or (b) if such Person is not a corporation, to vote or otherwise participate in the selection of the governing body, partners, managers or others that will control the management or policies of such Person.

"Common Stock" means the common stock of the Company, \$0.0001 par value per share, at the date of Executive signs this Indenture, subject to Section 14.07.

"Company" shall have the meaning specified in the first paragraph of this Indenture, and subject to the provisions of Article 11, shall include its successors and assigns.

"Company Order" means a written order of the Company, signed by any of its Officers and delivered to the Trustee.

"Conversion Agent" shall have the meaning specified in Section 4.02.

"Conversion Consideration" shall have the meaning specified in Section 14.12(a).

"Conversion Date" shall have the meaning specified in Section 14.02(c).

"Conversion Obligation" shall have the meaning specified in Section 14.01(a).

"Conversion Price" means as of any time, \$1,000, divided by the Conversion Rate as of such time.

"Conversion Rate" shall have the meaning specified in Section 14.01(a).

"Conversion Trigger Date" shall mean the earlier of (a) the date on which the Authorized Share Effective Date has occurred and (b) October 11, 2023.

"Corporate Trust Office" means the designated office of the Trustee at which at any time this Indenture shall be administered, which office at the date hereof is located at U.S. Bank Trust Company, National Association, West Side Flats, St. Paul, 60 Livingston Avenue, Saint

Paul, MN 55107, Attention Global Corporate Trust, or such other address as the Trustee may designate from time to time by notice to the Holders and the Company, or the designated corporate trust office of any successor trustee (or such other address as such successor trustee may designate from time to time by notice to the Holders and the Company). With respect to presentation of Notes for payment, registration of transfer or exchange, such office shall be U.S. Bank Trust Company, National Association, Global Corporate Trust, 111 Fillmore Avenue East, Saint Paul, MN 55107.

"Custodian" means the Trustee, as custodian for The Depository Trust Company, with respect to the Global Notes, or any successor entity thereto.

"Daily Conversion Value" means, for each of the 25 consecutive Trading Days during the relevant Observation Period, 4.0% of the product of (a) the Conversion Rate on such Trading Day and (b) the Daily VWAP on such Trading Day.

"Daily Measurement Value" means the Specified Dollar Amount (if any), *divided by 25*.

"Daily Settlement Amount," for each of the 25 consecutive Trading Days during the relevant Observation Period, shall consist of:

(a) cash in an amount equal to the lesser of (i) the Daily Measurement Value and (ii) the Daily Conversion Value on such Trading Day; and

(b) if the Daily Conversion Value on such Trading Day exceeds the Daily Measurement Value, a number of shares of Common Stock equal to (i) the difference between the Daily Conversion Value and the Daily Measurement Value, *divided by* (ii) the Daily VWAP for such Trading Day.

"Daily VWAP" means the per share volume-weighted average price as displayed under the heading "Bloomberg VWAP" on Bloomberg page "NKLA <equity> AQR" (or its equivalent successor if such page is not available) in respect of the period from the scheduled open of trading until the scheduled close of trading of the primary trading session on such Trading Day (or if such volume-weighted average price is unavailable, the market value of one share of the Common Stock on such Trading Day determined, using a volume-weighted average method, by a nationally recognized independent investment banking firm retained for this purpose by the Company). The **"Daily VWAP"** shall be determined without regard to after-hours trading or any other trading outside of the regular trading session trading hours.

"Debt" means, with respect to any Person, without duplication:

(1) all indebtedness of such Person for borrowed money;

(2) all obligations of such Person evidenced by bonds, debentures, notes or other similar instruments;

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(3) all obligations of such Person in respect of letters of credit, bankers' acceptances or other similar instruments;

(4) all obligations of such Person to pay the deferred and unpaid purchase price of property or services which are recorded as liabilities under GAAP, excluding trade payables arising in the ordinary course of business;

(5) all obligations of such Person as lessee under any Capital Lease;

(6) all Debt of other Persons Guaranteed by such Person to the extent so Guaranteed;

(7) all Debt of other Persons secured by a Lien on any asset of such Person, whether or not such Debt is assumed by such Person; and

(8) all obligations of such Person under Hedging Agreements.

The amount of Debt of any Person will be deemed to be:

(A) with respect to contingent obligations, the maximum liability upon the occurrence of the contingency giving rise to the obligation;

(B) with respect to any Hedging Agreement, the net amount payable if such Hedging Agreement terminated at that time due to default by such Person; or

(C) otherwise, the outstanding principal amount thereof.

Notwithstanding the foregoing, the term "Debt" shall not include:

- (1) any lease, concession or license of property (or Guarantee thereof) accounted for as an operating lease in accordance with GAAP;
- (2) contingent obligations in the ordinary course of business, other than Guarantees or other assumptions of Debt;
- (3) in connection with the purchase by the Company or any Subsidiary of the Company of any business, any post-closing payment adjustments or purchase price holdbacks to which the seller may become entitled to the extent such payment is determined by a final closing balance sheet, such payment depends on the performance of such business after the closing or to satisfy warranties or other unperformed obligations of the applicable seller; provided, however, that, at the time of closing, the amount of any such payment is not determinable and, to the extent such payment thereafter becomes fixed and determined, the amount is paid in a timely manner;
- (4) deferred or prepaid revenues in the ordinary course of business;
- (5) accrued expenses, accounts payables, taxes payable and other short-term payables in the ordinary course of business; or

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(6) any contingent obligations in respect of workers' compensation claims, early retirement or termination obligations, pension fund obligations or contributions or similar claims, obligations or contributions or social security or wage taxes.

"Default" means any event that is, or after notice or passage of time, or both, would be, an Event of Default.

"Defaulted Amounts" means any amounts on any Note (including, without limitation, the Redemption Price, the Fundamental Change Repurchase Price, principal and interest) that are payable but are not punctually paid or duly provided for.

"delivered" with respect to any notice to be delivered, given or mailed to a Holder pursuant to this Indenture, shall mean notice (x) given to the Depositary (or its designee) pursuant to the standing instructions from the Depositary or its designee, release, including by electronic mail in accordance with accepted practices or procedures at the Depositary (in the case of a Global Note) or (y) mailed to such Holder by first class mail, postage prepaid, at its address as it appears on the Note Register, in each case in accordance with Section 17.03. Notice so "delivered" shall be deemed to include any notice to be "mailed" or "given," as applicable, under this Indenture.

"Depositary" means, with respect to each Global Note, the Person specified in Section 2.05(c) as the Depositary with respect to such Notes, until a successor shall have been appointed and become such pursuant to the applicable provisions of this Indenture, and thereafter, **"Depositary"** shall mean or include such successor.

"Designated Institution" shall have the meaning specified in Section 14.12(a).

"Distributed Property" shall have the meaning specified in Section 14.04(c).

"Domestic Subsidiary" means any Subsidiary of the Company that was formed under the laws of the United States or any state or commonwealth of the United States or under the laws of the District of Columbia.

"Effective Date" means the first date on which shares of the Common Stock trade on the applicable exchange or in the applicable market, regular way, reflecting the relevant share split or share combination, as applicable.

"Equity Interests" means (a) for any entity, any and all shares, interests, rights to purchase, warrants, options, participations or other equivalents of or interests in (however designated) stock issued by that entity; *provided, however,* that "Equity Interests" does not include any debt security that is convertible into, or exchangeable for, "Equity Interests" described in clause (a) of this definition or for "Equity Interests" described in clause (a) of this definition and/or cash based on the value of such "Equity Interests."

"Event of Default" shall have the meaning specified in Section 6.01.

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"Ex-Dividend Date" means the first date on which shares of the Common Stock trade on the applicable exchange or in the applicable market, regular way, without the right to receive the issuance, dividend or distribution in question, from the Company or, if applicable, from the seller of the Common Stock on such exchange or market (in the form of due bills or otherwise) as determined by such exchange or market.

"Exchange Act" means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

"Exchange Election" shall have the meaning specified in Section 14.12(a).

"Existing Indentures" shall have the meaning specified in the definition of the term **"Authorized Share Effective Date"**.

"Form of Assignment and Transfer" means the "Form of Assignment and Transfer" attached as Attachment 3 to the Form of Note attached hereto as Exhibit A.

"Form of Fundamental Change Repurchase Notice" means the "Form of Fundamental Change Repurchase Notice" attached as Attachment 2 to the Form of Note attached hereto as Exhibit A.

"Form of Note" means the "Form of Note" attached hereto as Exhibit A.

"Form of Notice of Conversion" means the "Form of Notice of Conversion" attached as Attachment 1 to the Form of Note attached hereto as Exhibit A.

"Fundamental Change" shall be deemed to have occurred at the time after the Notes are originally issued if any of the following occurs prior to the Maturity Date:

(a) a "person" or "group" within the meaning of Section 13(d) of the Exchange Act, other than the Company, its Wholly Owned Subsidiaries and the employee benefit plans of the Company and its Wholly Owned Subsidiaries, files a Schedule TO or any schedule, form or report under the Exchange Act disclosing that such person or group has become the direct or indirect "beneficial owner," as defined in Rule 13d-3 under the Exchange Act, of the Common Stock representing more than 50% of the voting power of the Common Stock;

(b) the consummation of (A) any recapitalization, reclassification or change of the Common Stock (other than changes resulting from a subdivision, a combination or solely a change in par value) as a result of which the Common Stock would be converted into, or exchanged for, stock, other securities, other property or assets; (B) any share exchange, consolidation or merger of the Company pursuant to which the Common Stock will be converted into cash, securities or other property or assets; or (C) any sale, lease or other transfer in one transaction or a series of transactions of all or substantially all of the consolidated assets of the Company and its Subsidiaries, taken as a whole, to any Person other than one or more of the Company's Wholly Owned Subsidiaries; provided, however, that a transaction described in clause (B) in which the holders of all classes of

the Company's Common Equity immediately prior to such transaction own, directly or indirectly, more than 50% of all classes of Common Equity of the continuing or surviving Person or transferee or the parent thereof immediately after such transaction in substantially the same proportions (relative to each other) as such ownership immediately prior to such transaction shall not be a Fundamental Change pursuant to this clause (b);

- (c) the stockholders of the Company approve any plan or proposal for the liquidation or dissolution of the Company; or
- (d) the Common Stock ceases to be listed or quoted on any of The New York Stock Exchange, The Nasdaq Global Select Market or The Nasdaq Global Market (or any of their respective successors);

provided, however, that a transaction or transactions described in clause (a) or (b) above shall not constitute a Fundamental Change if at least 90% of the consideration received or to be received by the common stockholders of the Company, excluding cash payments for fractional shares and cash payments made in respect of dissenters' statutory appraisal rights, in connection with such transaction or transactions consists of shares of common stock that are listed or quoted on any of The New York Stock Exchange, The Nasdaq Global Select Market or The Nasdaq Global Market (or any of their respective successors) or will be so listed or quoted when issued or exchanged in connection with such transaction or transactions and as a result of such transaction or transactions the Notes become convertible (assuming Physical Settlement) into such consideration, excluding cash payments for fractional shares and cash payments made in respect of dissenters' statutory appraisal rights (subject to the provisions of Section 14.07).

For purposes of this definition of "Fundamental Change," any transaction that constitutes a Fundamental Change pursuant to both clause (a) and clause (b) (excluding the proviso to such clause (b)) of such definition shall be deemed a Fundamental Change solely under clause (b) of such definition (subject to such proviso).

"Fundamental Change Company Notice" shall have the meaning specified in Section 15.02(c).

"Fundamental Change Repurchase Date" shall have the meaning specified in Section 15.02(a).

"Fundamental Change Repurchase Notice" shall have the meaning specified in Section 15.02(b)(i).

"Fundamental Change Repurchase Price" shall have the meaning specified in Section 15.02(a).

"GAAP" means generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board

or in such other statements by such other entity as have been approved by a significant segment of the accounting profession, which are in effect from time to time.

"Global Note" shall have the meaning specified in Section 2.05(b).

"Guarantee" means, any obligation, contingent or otherwise, of any Person directly or indirectly guaranteeing any Debt or other obligation of any other Person and, without limiting the generality of the foregoing, any obligation, direct claim for severance pay, profit sharing, bonus or indirect, contingent similar benefit, equity-based awards and/or otherwise, of such Person (i) to purchase dividend equivalents thereon, pension, retirement, life insurance, health or pay (or advance or supply funds for the purchase or payment of) such Debt or other obligation of such other Person (whether arising by virtue of partnership arrangements, or by agreement to keep well, to purchase assets, goods, securities or services, to take-or-pay, or to maintain financial statement conditions or otherwise) or (ii) entered into for purposes of assuring in any other manner the obligee of such Debt or other obligation of the payment thereof or to protect such obligee against loss in respect thereof, in whole or in part; provided that the term "Guarantee" does not include endorsements for collection or deposit in the ordinary course of business. The term "Guarantee" used as a verb has a corresponding meaning.

"Guarantors" means each of (i) the Guarantors party hereto and (ii) any other Subsidiary of the Company that executes a Note Guarantee in accordance with the provisions of this Indenture, and its successors and assigns, in each case, until the Note Guarantee of such Person has been released in accordance with the provisions of this Indenture. Notwithstanding the foregoing, **"Guarantors"** shall not include any Non-Guarantor Subsidiary unless the Company otherwise elects to include such Subsidiary as a Guarantor.

"Hedging Agreement" means (i) any interest rate swap agreement, interest rate cap agreement or other agreement designed to protect against fluctuations in interest rates; (ii) any foreign exchange forward contract, currency swap agreement or other agreement designed to protect against fluctuations in foreign exchange rates or (iii) any commodity or raw material futures contract medical insurance or any other agreement designed to protect against fluctuations in raw material prices.

"Holder," as applied to any Note, fringe benefit, or other similar terms, means any Person in whose name at the time a particular Note is registered on the Note Register.

"Immaterial Subsidiary" means, as of any determination date, any Subsidiary that does not, or is not required to, Guarantee any indebtedness under either of the Existing Indentures in accordance with the terms thereof.

"Indenture" means this instrument as originally executed or, if amended or supplemented as herein provided, as so amended or supplemented.

"Initial Principal Amount" of any Note means the principal amount of such Note at the time of original issuance of such Note. For the avoidance of doubt, the **"Initial Principal Amount"** of each minimum denomination of Notes on their issue date shall be \$1.00.

"Interest Payment Date" means each June 30 and December 31 of each year, beginning on December 31, 2023.

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"Interest PIK Date" means each Interest Payment Date with respect to which the Company elects (or is deemed to have elected) to pay interest accrued on the Notes to, but excluding, such Interest Payment Date by the Capitalization Method pursuant to Section 2.03(d) hereof.

"June 2022 Indenture" shall have the meaning specified in the definition of the term **"Authorized Share Effective Date"**.

"Last Date of Original Issuance" means (A) with respect to any Notes issued on the date hereof and any Notes issued in exchange therefor or in substitution thereof, the initial issuance date of the Notes; and (B) with respect to any additional Notes issued pursuant to Section 2.10, and any Notes issued in exchange therefor or in substitution thereof, either (i) the date such Notes are originally issued or (ii) such other date as is specified in an Officer's Certificate delivered to the Trustee before the original issuance of such Notes.

"Last Reported Sale Price" of the Common Stock (or other security for which a Last Reported Sale Price must be determined) on any date means the closing sale price per share (or if no closing sale price is reported, the average of the last bid and last ask prices per share or, if more than one in either case, the average of the average last bid and the average last ask prices per share) on that date as reported in composite transactions for the principal U.S. national or regional securities exchange on which the Common Stock (or such other security) is traded. If the Common Stock (or such other security) is not listed for trading on a U.S. national or regional securities exchange on the relevant date, the **"Last Reported Sale Price"** shall be the last quoted bid price per share for the Common Stock (or such other security) in the over-the-counter market on the relevant date as reported by OTC Markets Group Inc. or a similar organization. If the Common Stock (or such other security) is not so quoted, the **"Last Reported Sale Price"** shall be the average of the mid-point of the last bid and ask prices per share for the Common Stock (or such other security) on the relevant date from each of at least three nationally recognized independent investment banking firms selected by the Company for this purpose. The **"Last Reported Sale Price"** shall be determined without regard to after-hours trading disability, or any other trading outside claims, agreements, obligations, demands and causes of regular trading session hours.

"Lien" means action, known or unknown, suspected or unsuspected resulting from any mortgage, security interest, pledge, lien, charge act or other similar encumbrance omission by or on the part of any kind whatsoever (including any conditional sale Releases committed or other title retention agreement or Capital Lease).

"Market Disruption Event" means (a) a failure by the principal U.S. national or regional securities exchange or market on which the Common Stock is listed or admitted for trading to open for trading during its regular trading session or (b) the occurrence or existence omitted prior to 1:00 p.m., New York City time, on any Scheduled Trading Day for the Common Stock for more than one half-hour period in date of this release, including, without limiting the aggregate during regular trading hours of any suspension or limitation imposed on trading (by reason of movements in price exceeding limits permitted by the relevant stock exchange or otherwise) in the Common Stock or in any options contracts or futures contracts traded on any U.S. exchange relating to the Common Stock.

"Maturity Date" means May 31, 2026.

"Measurement Period" shall have the meaning specified in Section 14.01(b)(i).

"Merger Event" shall have the meaning specified in Section 14.07(a).

"Minimum Specified Amount" shall have the meaning specified in Section 14.02(a)(iii).

"Non-Guarantor Subsidiary" means any Immaterial Subsidiary.

"Note" or **"Notes"** shall have the meaning specified in the first paragraph generality of the recitals of this Indenture.

"NoteGuarantee" means the guarantee by foregoing, any **Guarantor** claim under Title VII of the Company's Obligations under this Indenture and Civil Rights Act of 1964, the **Notes**.

"Note Register" shall have the meaning specified in Section 2.05(a).

"Note Registrar" shall have the meaning specified in Section 2.05(a).

"Notice of Conversion" shall have the meaning specified in Section 14.02(b).

"Obligations" shall have the meaning specified in Section 13.01.

"Observation Period" Americans with respect to any Note surrendered for conversion means: (i) subject to clause (ii), if the relevant Conversion Date occurs prior to February 28, 2026, the 25 consecutive Trading Day period beginning on, and including, the second Trading Day immediately succeeding such Conversion Date; (ii) with respect to any Called Notes, if the relevant Conversion Date occurs during the related Redemption Period, the 25 consecutive Trading Days beginning on, and including, the 26th Scheduled Trading Day immediately preceding the relevant Redemption Date; and (iii) subject to clause (ii), if the relevant Conversion Date occurs on or after February 28, 2026, the 25 consecutive Trading Days beginning on, and including, the 26th Scheduled Trading Day immediately preceding the Maturity Date.

"Officer" means, with respect to the Company Disabilities Act, or any other obligor federal, state or local law, regulation, constitution, ordinance or common law (collectively, the "Claims"). Notwithstanding the above, however, Executive is not releasing (1) any claims that cannot be waived under applicable state or federal law, (2) rights Executive may have to indemnification (including, without limitation, under the **Notes**, the Chief Executive Officer, the Chief Financial Officer, the Chief Legal Officer or General Counsel, the Treasurer, the Secretary, any Executive or Senior Vice President or any Vice President (whether or not designated by a number or numbers or word or words added before or after the title "Vice President") of such Person.

"Officer's Certificate," when used with respect to the Company, means a certificate that is delivered to the Trustee and that is signed by an Officer of the Company. Each such certificate shall include the statements provided for in Section 17.05 if and to the extent required by

the provisions of such Section. The Officer giving an Officer's Certificate pursuant to Section 4.08 shall be the principal executive, financial or accounting officer of the Company.

"open of business" means 9:00 a.m. (New York City time).

"Opinion of Counsel" means an opinion in writing signed by legal counsel, who may be an employee of or counsel to the Company, or other counsel who is reasonably acceptable to the Trustee, that is delivered to the Trustee, which opinion may contain customary exceptions and qualifications as to the matters set forth therein. Each such opinion shall include the statements provided for in Section 17.05 if and to the extent required by the provisions of such Section 17.05.

"Optional Redemption" shall have the meaning specified in Section 16.01.

"outstanding," when used with reference to Notes, shall, subject to the provisions of Section 8.04, mean, as of any particular time, all Notes authenticated and delivered by the Trustee under this Indenture, except:

- (a) Notes theretofore canceled by the Trustee or accepted by the Trustee for cancellation;
- (b) Notes, or portions thereof, that have become due and payable and in respect of which monies in the necessary amount shall have been deposited in trust with the Trustee or with any Paying Agent (other than the Company) or shall have been set aside and segregated in trust by the Company (if the Company shall act as its own Paying Agent);
- (c) Notes that have been paid pursuant to Section 2.06 or Notes in lieu of which, or in substitution for which, other Notes shall have been authenticated and delivered pursuant to the terms of Section 2.06 unless proof satisfactory to the Trustee is presented that any such Notes are held by protected purchasers in due course;
- (d) Notes converted pursuant to Article 14 and required to be cancelled pursuant to Section 2.08;
- (e) Notes redeemed pursuant to Article 16; and
- (f) Notes repurchased by the Company pursuant to the penultimate sentence of Section 2.10.

"Paying Agent" shall have the meaning specified in Section 4.02.

"Permitted Lien" means:

- (1) any Lien securing Debt of the Company or a Subsidiary of the Company owing to the Company or to any of its Subsidiaries;
- (2) Liens imposed by law, such as materialmen's, workmen's or repairmen's, carriers', warehousemen's and mechanic's Liens or other similar Liens, in each case for sums not yet overdue by more than 30 calendar days or being contested in good faith by appropriate proceedings;

(3) Liens for taxes, assessments or other governmental charges not yet due or payable or subject to penalties for non-payment or which are being contested in good faith by appropriate proceedings;

(4) pledges or deposits under worker's compensation laws, unemployment insurance laws or similar legislation, or good faith deposits in connection with bids, tenders, contracts or leases, or to secure public or statutory obligations, surety bonds, customs duties and the like, or for the payment of rent, in each case incurred in the ordinary course of business and not securing Debt;

(5) Liens consisting of easements, rights-of-way, zoning restrictions, restrictions on the use of real property, and defects and irregularities in the title thereto, landlords' Liens and other similar Liens none of which interfere materially with the use of the property covered thereby in the ordinary course of business and which do not, in the Company's opinion, materially detract from the value of such properties;

(6) Liens securing reimbursement obligations with respect to letters of credit that encumber documents and other property relating to such letters of credit and the proceeds thereof;

(7) Liens on assets pursuant to merger agreements, stock or asset purchase agreements and similar agreements in respect of the disposition of such assets;

(8) judgment liens incurred as a result of a judgment by a court of competent jurisdiction, so long as no Event of Default (as defined in the Indenture) then exists as a result thereof;

(9) Liens on property (including Capital Stock (as defined in the Indenture)) of a Person existing at the time such Person becomes a Subsidiary or is merged with or into or consolidated Executive's indemnification agreement with the Company, the Company's by-laws, the Company's D&O insurance and otherwise, (3) vested rights or any Subsidiary; benefits under Executive's 401k or other plans, (4) Executive's workers' compensation rights and, provided further, that such Liens were nothing in existence prior to the contemplation of such Person becoming a Subsidiary or such merger or consolidation, were not incurred in contemplation thereof and do not extend to any assets other than those of the Person that becomes a Subsidiary or is merged this Agreement shall prevent Executive from filing, cooperating with, or participating in any proceeding before the Equal Employment Opportunity Commission or Department of Labor, or (5) the Severance Benefits. In addition, nothing in this release shall prevent Executive from challenging its validity in a legal or administrative proceeding.

2. **ADEA Waiver.** Executive expressly acknowledges and agrees that by entering into or consolidated with the Company or this release, Executive is waiving any Subsidiary;

(10) Liens in the ordinary course of business on insurance policies and proceeds thereof, or other deposits, to secure insurance premium financings;

(11) Liens on cash (or the accounts in which such cash is held) or other property arising in connection with the defeasance, discharge or redemption of Debt;

(12) Liens on specific items of inventory or other goods (and the proceeds thereof) of any Person securing such Person's obligations in respect of bankers' acceptances issued or created in the ordinary course of business for the account of such Person to facilitate the purchase, shipment or storage of such inventory or other goods;

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(13) leases, licenses, subleases and sublicenses of assets in the ordinary course of business and Liens arising out of conditional sale, title retention, consignment or similar arrangements for the sale of assets entered into in the ordinary course of business;

(14) (i) mortgages, liens, security interests, restrictions, encumbrances or any other matters of record that have been placed by any developer, landlord or other third party on property over which the Company or any Subsidiary has easement all rights or on any real property leased by claims that Executive may have arising under the Company or any Subsidiary and subordination or similar agreements relating thereto and (ii) any condemnation or eminent domain proceedings or compulsory purchase order affecting real property;

(15) Liens securing or arising by reason Age Discrimination in Employment Act of any netting or set-off arrangement entered into in the ordinary course of banking or other trading activities; or

(16) pledges of goods, the related documents of title and/or other related documents arising or created in the ordinary course of business or operations 1967, as Liens only for Debt to a bank or financial institution directly relating to the goods or documents amended ("ADEA"), which have arisen on or over which the pledge exists.

"Person" means an individual, a corporation, a limited liability company, an association, a partnership, a joint venture, a joint stock company, a trust, an unincorporated organization or a government or an agency or a political subdivision thereof.

"Physical Notes" means permanent certificated Notes in registered form issued in denominations of \$1.00 principal amount and integral multiples thereof.

"Physical Settlement" shall have the meaning specified in Section 14.02(a).

"PIK Interest" means any interest paid pursuant to Section 2.03(d) by the Capitalization Method.

"PIK Interest Rate" means 8.00% per annum.

"PIK Notes" shall have the meaning specified in Section 2.03(d)(ii).

"PIK Payment" means the payment of any PIK Interest on the Notes.

"Predecessor Note" of any particular Note means every previous Note evidencing all or a portion of the same debt as that evidenced by such particular Note; and, for the purposes of this definition, any Note authenticated and delivered under Section 2.06 in lieu of or in exchange for a mutilated, lost, destroyed or stolen Note shall be deemed to evidence the same debt as the mutilated, lost, destroyed or stolen Note that it replaces.

"Record Date" means, with respect to any dividend, distribution or other transaction or event in which the holders of Common Stock (or other applicable security) have the right to receive any cash, securities or other property or in which the Common Stock (or such other security) is exchanged for or converted into any combination of cash, securities or other

property, the date fixed for determination of holders of the Common Stock (or such other security) entitled to receive such cash, securities or other property (whether such date is fixed by the Company, by statute, by contract or otherwise).

"Redemption Date" shall have the meaning specified in Section 16.02(a).

"Redemption Notice" shall have the meaning specified in Section 16.02(a).

"Redemption Notice Date" means the date on which a Redemption Notice is delivered pursuant to Section 16.02.

"Redemption Period" means the period from, and including, the relevant Redemption Notice Date until the close of business on the second Scheduled Trading Day immediately preceding the related Redemption Date.

"Redemption Price" means, for any Notes to be redeemed pursuant to Section 16.01,

(a) on or prior to the Interest Payment Date of December 31, 2023, 100% of the Initial Principal Amount of such Notes (it being understood and agreed that notwithstanding anything to the contrary in this Indenture or any such Note, (i) no interest that may have accrued from the date hereof to the Redemption Date shall be due to (A) the Holders of such Notes or (B) if such Redemption Date falls after a Regular Record Date but on or prior to the immediately succeeding Interest Payment Date, the Holder of record of such Notes as of the close of business on such Regular Record Date; (ii) the Company's payment of the Redemption Price for such Notes shall be deemed to satisfy in full its obligation to pay not just the Initial Principal Amount of the Note but also any accrued interest that has not been paid or capitalized, to, but not including, the Redemption Date and as a result, any accrued interest that has not been paid or capitalized to, but not including, the Redemption Date shall be deemed to be paid in full rather than cancelled, extinguished or forfeited; and (iii) each such Holder described in such clause (i)(A) or (B) shall to the extent it receives any such interest or portion thereof shall have no right thereto and shall promptly return the same to the Company upon its receipt thereof); and

(b) on and after the Interest Payment Date of June 1, 2025, 100% of the Capitalized Principal Amount of such Notes, *plus* any accrued interest that has not been paid or capitalized, if any, to, but excluding, the Redemption Date (unless the Redemption Date falls after a Regular Record Date but on or prior to the immediately succeeding Interest Payment Date, in which case interest accrued to the Interest Payment Date will be paid in cash at the Cash Interest Rate to Holders of record of such Notes as of the close of business on such Regular Record Date (notwithstanding any prior election (or deemed election) by the Company to pay such interest in this clause (b) pursuant to the Capitalization Method), and the Redemption Price will be equal to 100% of the Capitalized Principal Amount of such Notes).

"Reference Property" shall have the meaning specified in Section 14.07(a)(iv).

"Regular Record Date" with respect to any Interest Payment Date, means the June 15 or December 15 (whether or not such day is a Business Day) immediately preceding the applicable June 30 or December 31 Interest Payment Date, respectively.

"Responsible Officer" means, when used with respect to the Trustee, any officer within the corporate trust department of the Trustee, including any vice president, assistant vice president, assistant secretary, assistant treasurer, trust officer or any other officer of the Trustee who customarily performs functions similar to those performed by the Persons who at the time shall be such officers, respectively, or to whom any corporate trust matter is referred because of such person's knowledge of and familiarity with the particular subject and who shall have direct responsibility for the administration of this Indenture.

"Restricted Securities" shall have the meaning specified in Section 2.05(c).

"Rule 144" means Rule 144 as promulgated under the Securities Act.

"Rule 144A" means Rule 144A as promulgated under the Securities Act.

"Scheduled Trading Day" means a day that is scheduled to be a Trading Day on the principal U.S. national or regional securities exchange or market on which the Common Stock is listed or admitted for trading. If the Common Stock is not so listed or admitted for trading, **"Scheduled Trading Day"** means a Business Day.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

"Settlement Amount" has the meaning specified in Section 14.02(a)(iv).

"Settlement Method" means, with respect to any conversion of Notes, Physical Settlement, Cash Settlement or Combination Settlement, as elected (or deemed to have been elected) by the Company.

"Settlement Notice" has the meaning specified in Section 14.02(a)(iii).

"Significant Subsidiary" means a Subsidiary of the Company that meets the definition of "significant subsidiary" in Article 1, Rule 1-02 of Regulation S-X promulgated by the Commission (or any successor rule).

"Specified Conversion Rate Amount" means, for any date, an amount equal to (a) 674.4258 divided by (b) a quotient, (i) the numerator of which is the sum of (x) the Initial Principal Amount of all Notes then outstanding on such date immediately prior to the exercise of a Holder's conversion right on such date and (y) the aggregate Capitalization Amount of all such Notes for all Interest PIK Dates, if any, occurring on or prior to such date and (ii) the denominator of which is the Initial Principal Amount of all such Notes.

"Specified Dollar Amount" means the maximum cash amount per \$1,000 Capitalized Principal Amount of Notes to be received upon conversion (excluding cash in lieu of any).

fractional share of Common Stock) as specified in the Settlement Notice related to any converted Notes (or deemed specified pursuant to Section 14.02(a)).

"Spin-Off" shall have the meaning specified in Section 14.04(c).

"Stock Purchase Agreement" means that certain Stock Purchase Agreement, dated March 29, 2023, between the Company and the investors listed on Schedule 1 thereto.

"Subsidiary" means, with respect to any Person, any corporation, association, partnership or other business entity of which more than 50% of the total voting power of shares of Capital Stock or other interests (including partnership interests) entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers, general partners or trustees thereof is at the time owned or controlled, directly or indirectly, by (i) such Person; (ii) such Person and one or more Subsidiaries of such Person; or (iii) one or more Subsidiaries of such Person.

"Successor Company" shall have the meaning specified in Section 11.01(a).

"Trading Day" means, except for determining amounts due upon conversion as set forth below, a day on which (i) trading in the Common Stock (or other security for which a closing sale price must be determined) generally occurs on The Nasdaq Stock Market or, if the Common Stock (or such other security) is not then listed on The Nasdaq Stock Market, on the principal other U.S. national or regional securities exchange on which the Common Stock (or such other security) is then listed or, if the Common Stock (or such other security) is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock (or such other security) is then traded and (ii) a Last Reported Sale Price for the Common Stock (or closing sale price for such other security) is available on such securities exchange or market; *provided* that if the Common Stock (or such other security) is not so listed or traded, **"Trading Day"** means a Business Day; and *provided, further*, that for purposes of determining amounts due upon conversion only, **"Trading Day"** means a day on which (x) there is no Market Disruption Event and (y) trading in the Common Stock generally occurs on The Nasdaq Stock Market or, if the Common Stock is not then listed on The Nasdaq Stock Market, on the principal other U.S. national or regional securities exchange on which the Common Stock is then listed or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock is then listed or admitted for trading, except that if the Common Stock is not so listed or admitted for trading, **"Trading Day"** means a Business Day.

"Trading Price" of the Notes on any date of determination means the average of the secondary market bid quotations obtained by the Bid Solicitation Agent for \$1,000,000 principal amount of Notes at approximately 3:30 p.m., New York City time, on such determination date from three independent nationally recognized securities dealers the Company selects for this purpose; *provided* that if three such bids cannot reasonably be obtained by the Bid Solicitation Agent but two such bids are obtained, then the average of the two bids shall be used, and if only one such bid can reasonably be obtained by the Bid Solicitation Agent, that one bid shall be used. If the Bid Solicitation Agent cannot reasonably obtain at least one bid for \$1,000,000 principal

amount of Notes from a nationally recognized securities dealer on any determination date, then the Trading Price per \$1,000 principal amount of Notes on such determination date shall be deemed to be less than 98% of the product of the Last Reported Sale Price of the Common Stock and the Conversion Rate on such determination date.

"**transfer**" shall have the meaning specified in Section 2.05(c).

"**Trigger Event**" shall have the meaning specified in Section 14.04(c).

"**Trust Indenture Act**" means the Trust Indenture Act of 1939, as amended, as it was in force at before the date of execution of this Indenture; release. Executive further expressly acknowledges and agrees that:

- a. provided In return for this release, the Executive will receive consideration beyond that which Executive was already entitled to receive before entering into this Release;
- b. Executive is hereby advised in writing by this release to consult with an attorney before signing this release;
- c. however, Executive was given a copy of this release on [] and informed that in Executive had twenty-one (21) days within which to consider the event the Trust Indenture Act of 1939 is amended after the date hereof, the term "Trust Indenture Act" shall mean, release and that if Executive executes this release prior to the extent required by expiration of such amendment, the Trust Indenture Act of 1939, as 21-day period, Executive acknowledges that Executive will have done so amended, voluntarily and knowing that Executive is waiving Executive's right to have 21 days to consider this release;
- d. "Trustee" means Nothing in this release prevents or precludes Executive from challenging or seeking a determination in good faith of the Person named as the "Trustee" in the first paragraph validity of this Indenture until a successor trustee shall have become such pursuant to waiver under the applicable provisions of this Indenture, ADEA, nor does it impose any condition precedent, penalties or costs from doing so, unless specifically authorized by federal law; and thereafter "Trustee" shall mean or include each Person who is then a Trustee hereunder.
- e. "unit of Reference Property" shall have the meaning specified in Section 14.07(a).

"**Valuation Period**" shall have the meaning specified in Section 14.04(c).

"**Wholly Owned Subsidiary**" means, with respect to any Person, any Subsidiary of such Person, except Executive was informed that solely for purposes of this definition, the reference to "more than 50%" in the definition of "Subsidiary" shall be deemed replaced by a reference to "100%"; the calculation of which shall exclude nominal amounts of the voting power of shares of Capital Stock or other interests in the relevant Subsidiary not held by such Person to the extent required to satisfy local minority interest requirements outside of the United States.

"**Wholly Owned Domestic Subsidiary**" means any Wholly Owned Subsidiary of the Company that is a Domestic Subsidiary.

Section 1.02. *References to Interest.* Unless the context otherwise requires, (x) any reference to interest on, or in respect of, any Note in this Indenture shall be deemed to include Additional Interest if, in such context, Additional Interest is, was or would be payable pursuant to any of Section 4.06(d) and Section 6.03; (y) any express mention of Additional Interest in any provision hereof shall not be construed as excluding Additional Interest in those provisions hereof where such express mention is not made; and (z) any reference to accrued interest since the immediately preceding Interest Payment Date (or if there is no immediately preceding Interest Payment Date, from, and including, the issue date of such Note or such any date from which such Note bears interest as stated on such Note) on, or in respect of, any Note that Executive has not been paid or capitalized in this Indenture shall be deemed to refer to the amount of such interest that would have accrued as of the relevant time at the applicable Cash Interest Rate as if the Company had elected the Cash Method in respect of all of the relevant interest (whether or not

the Company actually elected the Cash Method and notwithstanding any prior election (or deemed election) by the Company to pay such interest pursuant to the Capitalization Method).

ARTICLE 2

ISSUE, DESCRIPTION, EXECUTION, REGISTRATION AND EXCHANGE OF NOTES

Section 2.01. Designation and Amount. The Notes shall be designated as the "8.00% / 8.00% Series C Convertible Senior PIK Toggle Notes due 2026." The aggregate principal amount of Notes that may be authenticated and issued under this Indenture is limited to \$11,000,000 in the aggregate, together with PIK Notes issued in accordance with the terms of this Indenture. The aggregate Initial Principal Amount of Notes that may be authenticated and delivered under this Indenture is initially limited to \$11,000,000, subject to Section 2.10 and except for Notes authenticated and delivered upon the issuance of PIK Notes or registration or transfer of, or in exchange for, or in lieu of other Notes to the extent permitted hereunder.

Section 2.02. Form of Notes. The Notes and the Trustee's certificate of authentication to be borne by such Notes shall be substantially in the respective forms set forth in Exhibit A, the terms and provisions of which shall constitute, and are hereby expressly incorporated in and made a part of this Indenture. To the extent applicable, the Company, the Guarantors and the Trustee, by their execution and delivery of this Indenture, expressly agree to such terms and provisions and to be bound thereby. In the case of any conflict between this Indenture and a Note, the provisions of this Indenture shall control and govern to the extent of such conflict.

Any Global Note may be endorsed with or have incorporated in the text thereof such legends or recitals or changes not inconsistent with the provisions of this Indenture as may be required by the Custodian or the Depositary, or as may be required to comply with any applicable law or any regulation thereunder or with the rules and regulations of any securities exchange or automated quotation system upon which the Notes may be listed or traded or designated for issuance or to conform with any usage with respect thereto, or to indicate any special limitations or restrictions to which any particular Notes are subject.

Any of the Notes may have such letters, numbers or other marks of identification and such notations, legends or endorsements as the Officer executing the same may approve (execution thereof to be conclusive evidence of such approval) and as are not inconsistent with the provisions of this Indenture, or as may be required to comply with any law or with any rule or regulation made pursuant thereto or with any rule or regulation of any securities exchange or automated quotation system on which the Notes may be listed or designated for issuance, or to conform to usage or to indicate any special limitations or restrictions to which any particular Notes are subject.

Each Global Note shall represent such principal amount of the outstanding Notes as shall be specified therein and shall provide that it shall represent the aggregate principal amount of outstanding Notes from time to time endorsed thereon and that the aggregate principal amount of outstanding Notes represented thereby may from time to time be increased or reduced to reflect PIK Interest, redemptions, repurchases, cancellations, conversions, transfers or exchanges permitted hereby. Any endorsement of a Global Note to reflect the amount of any increase or

decrease in the amount of outstanding Notes represented thereby shall be made by the Trustee or the Custodian, at the direction of the Trustee, in such manner and upon instructions given by the Company or the Holder of such Notes in accordance with this Indenture. Payment of principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, and accrued interest that has not been paid or capitalized on, a Global Note shall be made to the Holder of such Note on seven (7) days following the date of payment, unless a record date or other means of determining Holders eligible to receive payment is provided for herein.

Section 2.03. Date and Denomination of Notes; Payments of Interest and Defaulted Amounts. (a) The Notes shall be issuable in registered form without coupons in minimum denominations of \$1.00 principal amount and integral multiples thereof. PIK Interest on the Notes shall be paid in minimum denominations of \$1.00 and integral multiples thereof, rounded up to the nearest \$1.00. Each Note shall be dated the date of its authentication and shall bear interest from the date specified on the face of such Note. Accrued interest on the Notes shall be computed on the basis of a 360-day year composed of twelve 30-day months and, for partial months, on the basis of the number of days actually elapsed in a 30-day month.

(b) The Person in whose name any Note (or its Predecessor Note) is registered on the Note Register at the close of business on any Regular Record Date with respect to any Interest Payment Date shall be entitled to receive the interest payable on such Interest Payment Date. The Capitalized Principal Amount of any Note (x) in the case of any Physical Note, shall be payable at the office or agency of the Company designated by the Company for such purposes in the contiguous United States of America, which shall initially be the Corporate Trust Office and (y) in the case of any Global Note, shall be payable by wire transfer of immediately available funds to the account of the Depositary or its nominee. The Company shall pay (or cause the Paying Agent to pay to the extent funded by the Company) cash interest (i) on any Physical Notes (A) to Holders holding Physical Notes having an aggregate principal amount of \$5,000,000 or less, by check mailed to

the Holders of these Notes at their address as it appears in the Note Register and (B) to Holders holding Physical Notes having an aggregate principal amount of more than \$5,000,000, either by check mailed to each such Holder or, upon application by such a Holder to the Note Registrar (containing the requisite information for the Trustee or Paying Agent to make such wire transfer) not later than the relevant Regular Record Date, by wire transfer in immediately available funds to that Holder's account within the United States of America, which application shall remain in effect until the Holder notifies, in writing, the Note Registrar to the contrary or (ii) on any Global Note by wire transfer of immediately available funds to the account of the Depository or its nominee.

(c) Any Defaulted Amounts shall forthwith cease to be payable to the Holder on the relevant payment date but shall accrue interest per annum at the Cash Interest Rate borne by the Notes from, and including, such relevant payment date, and such Defaulted Amounts together with such interest thereon shall be paid by the Company, at its election in each case, as provided in clause (i) or (ii) below:

(i) The Company may elect to make payment of any Defaulted Amounts to the Persons in whose names the Notes (or their respective Predecessor Notes) are

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registered at the close of business on a special record date for the payment of such Defaulted Amounts, which shall be fixed in the following manner. The Company shall notify the Trustee in writing of the amount of the Defaulted Amounts proposed to be paid on each Note and the date of the proposed payment (which shall be not less than 25 days after the receipt by the Trustee of such notice, unless the Trustee shall consent to an earlier date), and at the same time the Company shall deposit with the Trustee an amount of money equal to the aggregate amount to be paid in respect of such Defaulted Amounts or shall make arrangements satisfactory to the Trustee for such deposit on or prior to the date of the proposed payment, such money when deposited to be held in trust for the benefit of the Persons entitled to such Defaulted Amounts as in this clause provided. Thereupon the Company shall fix a special record date for the payment of such Defaulted Amounts which shall be not more than 15 days and not less than 10 days prior to the date of the proposed payment, and not less than 10 days after the receipt by the Trustee of the notice of the proposed payment. The Company shall promptly notify the Trustee of such special record date and the Trustee, in the name and at the expense of the Company, shall cause notice of the proposed payment of such Defaulted Amounts and the special record date therefor to be delivered to each Holder at its address as it appears in the Note Register, or by electronic means to the Depository in the case of Global Notes, not less than 10 days prior to such special record date. Notice of the proposed payment of such Defaulted Amounts and the special record date therefor having been so delivered, such Defaulted Amounts shall be paid to the Persons in whose names the Notes (or their respective Predecessor Notes) are registered at the close of business on such special record date and shall no longer be payable pursuant to the following clause (ii) of this Section 2.03(c).

(ii) The Company may make payment of any Defaulted Amounts in any other lawful manner not inconsistent with the requirements of any securities exchange or automated quotation system on which the Notes may be listed or designated for issuance, and upon such notice as may be required by such exchange or automated quotation system, if, after notice given by the Company to the Trustee of the proposed payment pursuant to this clause, such manner of payment shall be deemed practicable by the Trustee.

(d)

(i) The Company may, at its option, elect to pay interest on the Notes on any Interest Payment Date (i) by paying an amount in cash on such Interest Payment Date equal to all or a portion of interest accrued from, and including, the immediately preceding Interest Payment Date (or if there is no immediately preceding Interest Payment Date, from, and including, the issue date of such Notes or such other date from which such Note bears interest as stated on such Note) on the principal amount as of the immediately preceding Interest Payment Date (or if there is no immediately preceding Interest Payment Date, on the Initial Principal Amount), calculated at the Cash Interest Rate (the "Cash Method") and (ii) to the extent not paid by the Cash Method, by payment-in-kind, in the case of Global Notes, by increasing the principal amount of such Global Notes by the Capitalization Amount for such Interest Payment Date or, in the case of Physical Notes, by issuing PIK Notes in the form of Physical Notes (the

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“Capitalization Method”); provided that on any Interest Payment Date on which the Company pays interest using the Capitalization Method, the aggregate Capitalization Amount shall be rounded up to the nearest \$1.00; and *provided further* that for any Notes (1) surrendered for conversion after a Regular Record Date and on or prior to the corresponding Interest Payment Date; (2) redeemed in connection with a Redemption Date that is after a Regular Record Date and on or prior to the corresponding Interest Payment Date; or (3) repurchased on a Fundamental Change Repurchase Date that is after a Regular Record Date and on or prior to the corresponding Interest Payment Date, any Capitalization Amount that would have been paid as PIK Interest for such Notes on such corresponding Interest Payment Date shall instead be paid in cash at the Cash Interest Rate to the relevant Holder(s) of such Notes as of such Regular Record Date, and no such PIK Payment shall be made on account of such Notes (notwithstanding any prior election (or deemed election) by the Company to pay such interest pursuant to the Capitalization Method for such Notes). The Company shall elect the method of paying interest on an Interest Payment Date by delivering a notice to the Trustee and Holders on or prior to the 15th calendar day immediately preceding the relevant Interest Payment Date identifying the method selected and (a) the amount of cash interest to be paid and/or (b) the amount of PIK Interest to be paid, as applicable. In the absence of such an election with respect to an Interest Payment Date, the Company shall be deemed to have elected the Cash Method for all of the interest due on such Interest Payment Date. All interest payable in respect of the Interest Payment Date scheduled to occur on the Maturity Date shall be paid entirely by the Cash Method.

(ii) The Company shall make payments of interest by the Cash Method in accordance with Section 4.01 (and Section 2.03(c), in the case of Defaulted Amounts). The Company shall make payments of interest by the Capitalization Method, (x) if the Notes are represented by one or more Physical Notes, by issuing additional Physical Notes to the relevant record Holder on the relevant Interest Payment Date (the “**PIK Notes**”) in an aggregate principal amount equal to the relevant Capitalization Amount (rounded up to the nearest \$1.00) and the Trustee will, upon receipt of a Company Order, authenticate and deliver such PIK Notes in the form of Physical Notes for original issuance to the Holders on the relevant Regular Record Date, as shown by the records of the register of Holders, and (y) if the Notes are represented by one or more Global Notes registered in the name of, or held by, the Depositary or its nominee on the relevant Regular Record Date, by increasing the principal amount of the outstanding Global Note by an amount equal to the amount of PIK Interest for the applicable interest period (rounded up to the nearest \$1.00), and the Trustee, upon receipt of a Company Order, will increase the principal amount of the outstanding Global Note by such amount. The issuance of any PIK Notes or the increase in the principal amount of the Global Note shall be computed on the basis of the aggregate principal amount of the Notes held by a Holder. Following an increase in the principal amount of the outstanding Global Notes as a result of a PIK Payment, the Global Notes shall bear interest on such increased principal amount from and after the date of such PIK Payment. Any PIK Notes issued as Physical Notes shall be dated as of the applicable Interest Payment Date and shall bear interest from and after such date. All PIK Notes issued pursuant to a PIK Payment shall be governed by, and subject to the terms, provisions and conditions of, this Indenture and

shall have the same rights and benefits as the Notes issued on the initial issue date of such Notes. Any PIK Notes shall be issued with the description PIK on the face of such Note, and references to the “principal amount” of the Notes shall include any increase in the principal amount of the outstanding Notes as a result of any PIK Payment. The Notes issued on the initial issue date and any PIK Notes shall be treated as a single class for all purposes under this Indenture.

Section 2.04. Execution, Authentication and Delivery of Notes. The Notes shall be signed in the name and on behalf of the Company by the manual, electronic or facsimile signature of any of its Chief Executive Officer, President, Chief Financial Officer, Chief Legal Officer or General Counsel, Treasurer, Secretary or any of its Executive or Senior Vice Presidents.

At any time and from time to time after the execution and delivery of this Indenture, the Company may deliver Notes executed by the Company to the Trustee for authentication, together with a Company Order for the authentication and delivery of such Notes, and the Trustee in accordance with such Company Order shall authenticate and deliver such Notes, without any further action by the Company hereunder; *provided* that, as set forth in and subject to Section 17.05, the Trustee shall receive and shall be fully protected in conclusively relying upon an Officer's Certificate and an Opinion of Counsel of the Company with respect to the issuance, authentication and delivery of such Notes.

Only such Notes as shall bear thereon a certificate of authentication substantially in the form set forth on the Form of Note attached as Exhibit A hereto, executed manually or by facsimile by an authorized officer of the Trustee (or an authenticating agent appointed by the Trustee as provided by Section 17.10), shall be entitled to the benefits of this Indenture or be valid or obligatory for any purpose. Such certificate by the Trustee (or such an authenticating agent) upon any Note executed by the Company shall be conclusive evidence that the Note so authenticated has been duly authenticated and delivered hereunder and that the Holder is entitled to the benefits of this Indenture.

In case any Officer of the Company who shall have signed any of the Notes shall cease to be such Officer before the Notes so signed shall have been authenticated and delivered by the Trustee, or disposed of by the Company, such Notes nevertheless may be authenticated and delivered or disposed of as though the Person who signed such Notes had not ceased to be such Officer of the Company; and any Note may be signed on behalf of the Company by such persons as, at the actual date of the execution of such Note, shall be the Officers of the Company, although at the date of the execution of this Indenture any such Person was not such an Officer.

Section 2.05. Exchange and Registration of Transfer of Notes; Restrictions on Transfer; Depositary.(a) The Company shall cause to be kept at the Corporate Trust Office a register (the register maintained in such office or in any other office or agency of the Company designated pursuant to Section 4.02, the "**Note Register**") in which subject to such reasonable regulations as may prescribe, the Company shall provide for the registration of Notes and of transfers of Notes. Such register shall this release will become null and void if Executive elects revocation during that time. Any revocation must be in written form or in any form capable of being converted into

written form within a reasonable period of time. The Trustee is hereby initially appointed the "**Note Registrar**" for the purpose of registering Notes writing and transfers of Notes as herein provided. The Company may appoint one or more co-Note Registrars in accordance with Section 4.02.

Upon surrender for registration of transfer of any Physical Note to the Note Registrar or any co-Note Registrar, and satisfaction of the requirements for such transfer set forth in this Section 2.05, the Company shall execute, and the Trustee shall authenticate and deliver, in the name of the designated transferee or transferees, one or more new Physical Notes of any authorized denominations and of a like aggregate principal amount and bearing such restrictive legends as may be required by this Indenture.

Physical Notes may be exchanged for other Physical Notes of any authorized denominations and of a like aggregate principal amount, upon surrender of the Notes to be exchanged at any such office or agency maintained by the Company pursuant to Section 4.02. Whenever any Physical Notes are so surrendered for exchange, the Company shall execute, and the Trustee shall authenticate and deliver, the Physical Notes that the Holder making the exchange is entitled to receive, bearing registration numbers not contemporaneously outstanding. A holder of a beneficial interest in a note in a Global Note may transfer or exchange such beneficial interest in accordance with this Indenture and the applicable procedures of the Depositary.

All Notes presented or surrendered for registration of transfer or for exchange, repurchase or conversion shall (if so required by the Company, the Trustee, the Note Registrar or any co-Note Registrar) be duly endorsed, or be accompanied by a written instrument or instruments of transfer in form satisfactory to the Company and duly executed, by the Holder thereof or its attorney-in-fact duly authorized in writing.

No service charge shall be imposed by the Company, the Trustee, the Note Registrar, any co-Note Registrar or the Paying Agent for any exchange or registration of transfer of Notes, but the Company may require a Holder to pay a sum sufficient to cover any documentary, stamp or similar issue or transfer tax or other similar governmental charge required in connection therewith as a result of the name of the Holder of new Notes issued upon such exchange or registration of transfer being different from the name of the Holder of the old Notes surrendered for exchange or registration of transfer or otherwise required by law.

None of the Company, the Trustee, the Note Registrar or any co-Note Registrar shall be required to exchange or register a transfer of (i) any Notes surrendered for conversion or, if a portion of any Note is surrendered for conversion, such portion thereof surrendered for conversion, (ii) any Notes, or a portion of any Note, surrendered for

repurchase (and not withdrawn) in accordance with Article 15 or (iii) any Notes selected for redemption in accordance with Article 16, except the unredeemed portion of any Note being redeemed in part or (iv) any Notes between a Regular Record Date and corresponding Interest Payment Date.

All Notes issued upon any registration of transfer or exchange of Notes in accordance with this Indenture shall be the valid obligations of the Company, evidencing the same debt, and

entitled to the same benefits under this Indenture as the Notes surrendered upon such registration of transfer or exchange.

(b) So long as the Notes are eligible for book-entry settlement with the Depository, unless otherwise required by law, subject to the fourth paragraph from the end of Section 2.05(c) all Notes shall be represented by one or more Notes in global form (each, a "Global Note") registered in the name of the Depository or the nominee of the Depository. Each Global Note shall bear the legend required on a Global Note set forth in Exhibit A hereto. The transfer and exchange of beneficial interests in a Global Note that does not involve the issuance of a Physical Note shall be effected through the Depository (but not the Trustee or the Custodian) in accordance with this Indenture (including the restrictions on transfer set forth herein) and the procedures of the Depository therefor.

(c) Every Note that bears or is required under this Section 2.05(c) to bear the legend set forth in this Section 2.05(c) (together with any Common Stock issued upon conversion of the Notes that is required to bear the legend set forth in Section 2.05(d), collectively, the "Restricted Securities") shall be subject to the restrictions on transfer set forth in this Section 2.05(c) (including those contained in the legend set forth below), unless such restrictions on transfer shall be eliminated or otherwise waived by written consent of the Company, and the Holder of each such Restricted Security, by such Holder's acceptance thereof, agrees to be bound by all such restrictions on transfer. As used in this Section 2.05(c) and Section 2.05(d), the term "transfer" encompasses any sale, pledge, transfer or other disposition whatsoever of any Restricted Security.

Any certificate evidencing a Note (and all securities issued in exchange therefor or substitution thereof, other than Common Stock, if any, issued upon conversion thereof, which shall bear the legend set forth in Section 2.05(d), if applicable) shall bear a legend in substantially the following form (unless such Notes have been transferred pursuant to a registration statement that has become or been declared effective under the Securities Act and that continues to be effective at the time of such transfer, or sold pursuant to the exemption from registration provided by Rule 144 or any similar provision then in force under the Securities Act, or unless otherwise agreed by the Company in writing, with notice thereof to the Trustee):

THIS SECURITY AND THE COMMON STOCK, IF ANY, ISSUABLE UPON CONVERSION OF THIS SECURITY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT IN ACCORDANCE WITH THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF OR OF A BENEFICIAL INTEREST HEREIN, THE ACQUIRER:

(1) REPRESENTS THAT IT AND ANY ACCOUNT FOR WHICH IT IS ACTING IS A "QUALIFIED INSTITUTIONAL BUYER" (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT, AND

(2) AGREES FOR THE BENEFIT OF NIKOLA CORPORATION (THE “COMPANY”) THAT IT WILL NOT OFFER, SELL, PLEDGE OR OTHERWISE TRANSFER THIS SECURITY OR ANY BENEFICIAL INTEREST HEREIN EXCEPT:

- (A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF,
- (B) PURSUANT TO A REGISTRATION STATEMENT WHICH HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT,
- (C) TO A QUALIFIED INSTITUTIONAL BUYER IN COMPLIANCE WITH RULE 144A UNDER THE SECURITIES ACT, OR
- (D) PURSUANT TO AN EXEMPTION FROM REGISTRATION PROVIDED BY RULE 144 UNDER THE SECURITIES ACT OR ANY OTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

PRIOR TO THE REGISTRATION OF ANY TRANSFER IN ACCORDANCE WITH CLAUSE (2)(D) ABOVE, THE COMPANY AND THE TRUSTEE RESERVE THE RIGHT TO REQUIRE THE DELIVERY OF SUCH LEGAL OPINIONS, CERTIFICATIONS OR OTHER EVIDENCE AS MAY REASONABLY BE REQUIRED IN ORDER TO DETERMINE THAT THE PROPOSED TRANSFER IS BEING MADE IN COMPLIANCE WITH THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS. NO REPRESENTATION IS MADE AS TO THE AVAILABILITY OF ANY EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

No transfer of any Note will be registered by the Note Registrar unless the applicable box on the Form of Assignment and Transfer has been checked.

Any Note (or security issued in exchange or substitution therefor) (i) that has been transferred pursuant to a registration statement that has become effective or been declared effective under the Securities Act and that continues to be effective at the time of such transfer or (ii) that has been sold pursuant to the exemption from registration provided by Rule 144 or any similar provision then in force under the Securities Act, may, upon surrender of such Note for exchange to the Note Registrar in accordance with the provisions of this Section 2.05, be exchanged for a new Note or Notes, of like tenor and aggregate principal amount, which shall not bear the restrictive legend required by this Section 2.05(c) and shall not be assigned a restricted CUSIP number. The Company shall be entitled to instruct the Custodian in writing to so surrender any Global Note as to which any of the conditions set forth in clause (i) or (ii) of the immediately preceding sentence have been satisfied, and, upon such instruction, the Custodian shall so surrender such Global Note for exchange; and any new Global Note so exchanged therefor shall not bear the restrictive legend specified in this Section 2.05(c) and shall not be assigned a restricted CUSIP number. The Company shall notify the Trustee promptly after a registration statement, if any, with respect to the Notes or any Common Stock issued upon conversion of the Notes has been declared effective under the Securities Act. Any exchange

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pursuant to the foregoing paragraph shall be in accordance with the applicable procedures of the Depository.

Notwithstanding any other provisions of this Indenture (other than the provisions set forth in this Section 2.05(c)), a Global Note may not be transferred as a whole or in part except (i) by the Depository to a nominee of the Depository or by a nominee of the Depository to the Depository or another nominee of the Depository or by the Depository or any such nominee to a successor Depository or a nominee of such successor Depository and (ii) for exchange of a Global Note or a portion thereof for one or more Physical Notes in accordance with the second immediately succeeding paragraph.

The Depository shall be a clearing agency registered under the Exchange Act. The Company initially appoints The Depository Trust Company to act as Depository with respect to each Global Note. Initially, each Global Note shall be issued to the Depository, registered in the name of Cede & Co., as the nominee of the Depository, and deposited with the Trustee as custodian for Cede & Co.

If (i) the Depository notifies the Company at any time that the Depository is unwilling or unable to continue as depositary for the Global Notes and a successor depositary is not appointed within 90 days, (ii) the Depository ceases to be registered as a clearing agency under the Exchange Act and a successor depositary is not appointed within 90 days or (iii) an Event of Default with respect to the Notes has occurred and is continuing and, subject to the Depository's applicable procedures, a beneficial owner of any Note requests that its beneficial interest therein be issued as a Physical Note, the Company shall execute, and the Trustee, upon receipt of an Officer's Certificate and a Company Order for the authentication and delivery of Notes, shall authenticate and deliver (x) in the case of clause (iii), a Physical Note to such beneficial owner in a principal amount equal to the principal amount of such Note corresponding to such beneficial owner's beneficial interest and (y) in the case of clause (i) or (ii), Physical Notes to each beneficial owner of the related Global Notes (or a portion thereof) in an aggregate principal amount equal to the aggregate principal amount of such Global Notes in exchange for such Global Notes, and upon delivery of the Global Notes to the Trustee such Global Notes shall be canceled.

Physical Notes issued in exchange for all or a part of the Global Note pursuant to this Section 2.05(c) shall be registered in such names and in such authorized denominations as the Depositary, pursuant to instructions from its direct or indirect participants or otherwise, or, in the case of clause (iii) of the immediately preceding paragraph, the relevant beneficial owner, shall instruct the Trustee. Upon execution and authentication, the Trustee shall deliver such Physical Notes to the Persons in whose names such Physical Notes are so registered.

At such time as all interests in a Global Note have been converted, canceled, redeemed, repurchased or transferred, such Global Note shall be, upon receipt thereof, canceled by the Trustee in accordance with standing procedures and existing instructions between the Depositary and the Custodian. At any time prior to such cancellation, if any interest in a Global Note is exchanged for Physical Notes, converted, canceled, redeemed, repurchased or transferred to a transferee who receives Physical Notes therefor or any Physical Note is exchanged or transferred

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for part of such Global Note, the principal amount of such Global Note shall, in accordance with the standing procedures and instructions existing between the Depositary and the Custodian, be appropriately reduced or increased, as the case may be, and an endorsement shall be made on such Global Note, by the Trustee or the Custodian, at the direction of the Trustee, to reflect such reduction or increase.

None of the Company, the Guarantors, the Trustee or any agent of the Company, the Guarantors or the Trustee shall have any responsibility or incur any liability for the payment of amounts to owners of beneficial interest in a Global Note, for any aspect of the records relating to or payments made on account of those interests by the Depositary, or for maintaining, supervising or reviewing any records of the Depositary relating to such beneficial ownership of those interests.

The rights of beneficial owners in any Global Note shall be exercised only through the Depositary subject to the applicable procedures of the Depositary. The Trustee may conclusively rely and shall be fully protected in relying upon information furnished by the Depositary with respect to its members, participants and any beneficial owners.

(d) Any stock certificate or book-entry representing Common Stock issued upon conversion of a Note shall bear a legend in substantially the following form (unless the Note or such Common Stock has been transferred pursuant to a registration statement that has become or been declared effective under the Securities Act and that continues to be effective at the time of such transfer, or pursuant to the exemption from registration provided by Rule 144 or any similar provision then in force under the Securities Act, or such Common Stock has been issued upon conversion of Notes that have been transferred pursuant to a registration statement that has become or been declared effective under the Securities Act and that continues to be effective at the time of such transfer, or pursuant to the exemption from registration provided by Rule 144 or any similar provision then in force under the Securities Act, or unless otherwise agreed by the Company with written notice thereof to the Trustee and any transfer agent for the Common Stock):

THIS SECURITY HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT IN ACCORDANCE WITH THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF OR OF A BENEFICIAL INTEREST HEREIN, THE ACQUIRER:

(1) REPRESENTS THAT IT AND ANY ACCOUNT FOR WHICH IT IS ACTING IS A "QUALIFIED INSTITUTIONAL BUYER" (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT, AND

(2) AGREES FOR THE BENEFIT OF NIKOLA CORPORATION (THE "COMPANY") THAT IT WILL NOT OFFER, SELL, PLEDGE OR OTHERWISE TRANSFER THIS SECURITY OR ANY BENEFICIAL INTEREST HEREIN EXCEPT:

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(A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF,

- (B) PURSUANT TO A REGISTRATION STATEMENT WHICH HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT,
- (C) TO A QUALIFIED INSTITUTIONAL BUYER IN COMPLIANCE WITH RULE 144A UNDER THE SECURITIES ACT, OR
- (D) PURSUANT TO AN EXEMPTION FROM REGISTRATION PROVIDED BY RULE 144 UNDER THE SECURITIES ACT OR ANY OTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

PRIOR TO THE REGISTRATION OF ANY TRANSFER IN ACCORDANCE WITH CLAUSE (2)(D) ABOVE, THE COMPANY AND THE TRANSFER AGENT FOR THE COMPANY'S COMMON STOCK RESERVE THE RIGHT TO REQUIRE THE DELIVERY OF SUCH LEGAL OPINIONS, CERTIFICATIONS OR OTHER EVIDENCE AS MAY REASONABLY BE REQUIRED IN ORDER TO DETERMINE THAT THE PROPOSED TRANSFER IS BEING MADE IN COMPLIANCE WITH THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS. NO REPRESENTATION IS MADE AS TO THE AVAILABILITY OF ANY EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

Any such Common Stock (i) as to which such restrictions on transfer shall have expired in accordance with their terms, (ii) that has been transferred pursuant to a registration statement that has become or been declared effective under the Securities Act and that continues to be effective at the time of such transfer or (iii) that has been sold pursuant to the exemption from registration provided by Rule 144 or any similar provision then in force under the Securities Act, may, upon surrender of the certificates representing such shares of Common Stock for exchange in accordance with the procedures of the transfer agent for the Common Stock, be exchanged for a new certificate or certificates for a like aggregate number of shares of Common Stock, which shall not bear the restrictive legend required by this Section 2.05(d).

(e) Any Note or Common Stock issued upon the conversion or exchange of a Note that is repurchased or owned by any Affiliate of the Company (or any Person who was an Affiliate of the Company at any time during the three months immediately preceding) may not be resold by such Affiliate (or such Person, as the case may be) unless registered under the Securities Act or resold pursuant to an exemption from the registration requirements of the Securities Act in a transaction that results in such Note or Common Stock, as the case may be, no longer being a "restricted security" (as defined under Rule 144). The Company shall cause any Note that is repurchased or owned by it to be surrendered to the Trustee for cancellation in accordance with Section 2.08.

(f) If a Holder of any Note or share of Common Stock issued upon conversion of any Note, or an owner of a beneficial interest in any Global Note, or in a global certificate representing any share of Common Stock issued upon conversion of any Note, transfers such Note or share in compliance with Rule 144 or pursuant to an effective registration statement and

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delivers to the Company a written request in customary form (including, if pursuant to Rule 144, a certification that it is not, and has not been at any time during the preceding three (3) months, an Affiliate of the Company) to reissue such Note or share without a restrictive legend, then the Company will use commercially reasonable efforts to cause the same to occur (and, if applicable, cause such Note or share to thereafter be represented by an "unrestricted" CUSIP or ISIN number in the facilities of the related depositary) within two (2) Business Days of such request.

Section 2.06. *Mutilated, Destroyed, Lost or Stolen Notes.* In case any Note shall become mutilated or be destroyed, lost or stolen, the Company in its discretion may execute, and upon its written request the Trustee or an authenticating agent appointed by the Trustee shall authenticate and deliver, a new Note, bearing a registration number not contemporaneously outstanding, in exchange and substitution for the mutilated Note, or in lieu of and in substitution for the Note so destroyed, lost or stolen. In every case the applicant for a substituted Note shall furnish to the Company, to the Trustee and, if applicable, to such authenticating agent such security or indemnity as may be required by them to save each of them harmless from any loss, liability, claim, cost or expense caused by or connected with such substitution, and, in every case of destruction, loss or theft, the applicant shall also furnish to the Company, to the Trustee and, if applicable, to such authenticating agent evidence to their satisfaction of the destruction, loss or theft of such Note and of the ownership thereof.

The Trustee or such authenticating agent may authenticate any such substituted Note and deliver the same upon the receipt of such security or indemnity as the Trustee, the Company and, if applicable, such authenticating agent may require. No service charge shall be imposed by the Company, the Trustee, the Note Registrar, any co-Note Registrar or the Paying Agent upon the issuance of any substitute Note, but the Company may require a Holder to pay a sum sufficient to cover any documentary, stamp or similar issue or transfer tax or other similar governmental charge required in connection therewith as a result of the name of the Holder of the new substitute Note being different from the name of the Holder of the old Note that became mutilated or was destroyed, lost or stolen. In case any Note that has matured or is about to mature or has been surrendered for required repurchase or is about to be converted in accordance with Article 14 shall become mutilated or be destroyed, lost or stolen, the Company may, in its sole discretion, instead of issuing a substitute Note, pay or authorize the payment of or convert or authorize the conversion of the same (without surrender thereof except in the case of a

mutilated Note), as the case may be, if the applicant for such payment or conversion shall furnish to the Company, to the Trustee and, if applicable, to such authenticating agent such security or indemnity as may be required by them to save each of them harmless for any loss, liability, cost or expense caused by or connected with such substitution, and, in every case of destruction, loss or theft, evidence satisfactory to the Company, the Trustee and, if applicable, any Paying Agent or Conversion Agent of the destruction, loss or theft of such Note and of the ownership thereof.

Every substitute Note issued pursuant to the provisions of this Section 2.06 by virtue of the fact that any Note is destroyed, lost or stolen shall constitute an additional contractual obligation of the Company, whether or not the destroyed, lost or stolen Note shall be found at any time, and shall be entitled to all the benefits of (but shall be subject to all the limitations set forth in) this Indenture equally and proportionately with any and all other Notes duly issued hereunder. To the extent permitted by law, all Notes shall be held and owned upon the express

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condition that the foregoing provisions are exclusive with respect to the replacement, payment, conversion, redemption or repurchase of mutilated, destroyed, lost or stolen Notes and shall preclude any and all other rights or remedies notwithstanding any law or statute existing or hereafter enacted to the contrary with respect to the replacement, payment, conversion, redemption or repurchase of negotiable instruments or other securities without their surrender.

Section 2.07. *Temporary Notes.* Pending the preparation of Physical Notes, the Company may execute and the Trustee or an authenticating agent appointed by the Trustee shall, upon written request of the Company, authenticate and deliver temporary Notes in registered form (printed or lithographed). Temporary Notes shall be issuable in any authorized denomination, and substantially in the form of the Physical Notes but with such omissions, insertions and variations as may be appropriate for temporary Notes, all as may be determined by the Company. Every such temporary Note shall be executed by the Company and authenticated by the Trustee or such authenticating agent upon the same conditions and in substantially the same manner, and with the same effect, as the Physical Notes. Without unreasonable delay, the Company shall execute and deliver to the Trustee or such authenticating agent Physical Notes (other than any Global Note) and thereupon any or all temporary Notes (other than any Global Note) may be surrendered in exchange therefor, at each office or agency maintained by the Company pursuant to Section 4.02 and the Trustee or such authenticating agent shall authenticate and deliver in exchange for such temporary Notes an equal aggregate principal amount of Physical Notes. Such exchange shall be made by the Company at its own expense and without any charge therefor. Until so exchanged, the temporary Notes shall in all respects be entitled to the same benefits and subject to the same limitations under this Indenture as Physical Notes authenticated and delivered hereunder.

Section 2.08. *Cancellation of Notes Paid, Converted, Etc.* The Company shall cause all Notes surrendered for payment, redemption, repurchase, registration of transfer or exchange or conversion, if surrendered to any Person other than the Trustee (including any of the Company's agents, Subsidiaries or Affiliates), to be delivered to the Trustee for cancellation. All Notes delivered to the Trustee shall be canceled promptly by it, and, except for Notes surrendered for transfer or exchange, or as otherwise expressly permitted by any of the provisions of this Indenture, no Notes shall be authenticated in exchange therefor. The Trustee shall dispose of canceled Notes in accordance with its customary procedures and, after such disposition, shall deliver a certificate of such disposition to the Company upon the Company's written request in a Company Order. Except for Notes surrendered for transfer or exchange, no Notes shall be authenticated in exchange for any Notes cancelled as provided in this Indenture.

Section 2.09. *CUSIP Numbers.* The Company in issuing the Notes may use "CUSIP" numbers (if then generally in use), and, if so, the Trustee shall use "CUSIP" numbers in all notices issued to Holders as a convenience to such Holders; *provided* that any such notice may state that no representation is made as to the correctness of such numbers either as printed on the Notes or on such notice and that reliance may be placed only on the other identification numbers printed on the Notes. The Company shall promptly notify the Trustee in writing of any change in the "CUSIP" numbers.

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Section 2.10. Additional Notes; Repurchases. The Company may, without the consent of or notice to the Holders, reopen this Indenture and issue additional Notes hereunder (in addition to any PIK Notes) with the same terms as the Notes initially issued hereunder (other than differences in the issue date, the issue price, interest accrued prior to the issue date of such additional Notes and, if applicable, restrictions on transfer in respect of such additional Notes (including pursuant to Section 2.05 hereunder)) in an aggregate principal amount together with the Initial Principal Amount not to exceed \$11,000,000 in the aggregate; *provided* that if any such additional Notes are not fungible with the Notes initially issued hereunder for U.S. federal income tax or securities law purposes, such additional Notes shall have one or more separate CUSIP numbers. Any additional Notes will be treated as a single series for all purposes under this Indenture except as set forth in the first sentence of this Section 2.10. Prior to the issuance of any such additional Notes, the Company shall deliver to the Trustee a Company Order, an Officer's Certificate and an Opinion of Counsel, such Officer's Certificate and Opinion of Counsel to cover such matters, in addition to those required by Section 17.05, as the Trustee shall reasonably request. In addition, the Company may, to the extent permitted by law, and directly or indirectly (regardless of whether such Notes are surrendered to the Company), repurchase Notes in the open market or otherwise, whether by the Company or its Subsidiaries or through a privately negotiated transaction or private or public tender or exchange offer or through counterparties to private agreements, including by cash-settled swaps or other derivatives, in each case, without prior written notice to or consent of the Holders. The Company shall cause any Notes so repurchased (other than Notes repurchased pursuant to cash-settled swaps or other derivatives) to be surrendered to the Trustee for cancellation in accordance with Section 2.08 and such Notes shall no longer be considered outstanding under this Indenture upon their repurchase.

ARTICLE 3
SATISFACTION AND DISCHARGE

Section 3.01. Satisfaction and Discharge. This Indenture shall upon request of the Company contained in an Officer's Certificate cease to be of further effect, and the Trustee, at the expense of the Company, shall execute proper instruments acknowledging satisfaction and discharge of this Indenture, when (a) (i) all Notes theretofore authenticated and delivered (other than (x) Notes which have been destroyed, lost or stolen and which have been replaced, paid or converted as provided in Section 2.06 and (y) Notes for whose payment money has theretofore been deposited in trust or segregated and held in trust by the Company and thereafter repaid to the Company or discharged from such trust, as provided in Section 4.04(d)) have been delivered to the Trustee for cancellation; or (ii) the Company or any Guarantor has irrevocably deposited with the Trustee (or with the Paying Agent or, with respect to the Company's Conversion Obligation, the Conversion Agent) or delivered to Holders, as applicable, after the Notes have become due and payable, whether on the Maturity Date, any Redemption Date, any Fundamental Change Repurchase Date, upon conversion or otherwise, cash or cash, shares of Common Stock or a combination thereof, as applicable, solely to satisfy the Conversion Obligation, sufficient to pay all of the outstanding Notes and all other sums due and payable under this Indenture by the Company and the Guarantors; and (b) the Company has delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent herein provided

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for relating to the satisfaction and discharge of this Indenture have been complied with. Notwithstanding the satisfaction and discharge of this Indenture, the obligations of the Company and the Guarantors to the Trustee under Section 7.06 shall survive.

ARTICLE 4
PARTICULAR COVENANTS OF THE COMPANY

Section 4.01. Payment of Principal and Interest. The Company covenants and agrees that it will cause to be paid the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, and pay accrued interest that has not been paid or

capitalized on, each of the Notes at the places, at the respective times and in the manner provided in this Section 4.01, Section 2.03(c), Section 2.03(d) and in the Notes. Principal, premium, if any, and interest payable by the Cash Method shall be considered paid on the date due if by 10:00 a.m. (New York time) on such date the Trustee or the Paying Agent holds in accordance with this Indenture money sufficient to pay all principal, premium, if any, and cash interest then due and the Trustee or the Paying Agent, as the case may be, is not prohibited from paying such money to the Holders on that date pursuant to the terms of this Indenture. Payments of interest by the Capitalization Method shall be considered paid if the Trustee has received the Company Order required by Section 2.03(d) and, in the case of Physical Notes, PIK Notes in the form of Physical Notes executed by a proper Officer of the Company.

Notwithstanding anything to the contrary contained in this Indenture, the Company shall have the right to deduct or withhold from any principal, premium or interest (including any Additional Interest) payments with respect to the Notes hereunder, such amounts as are required to be deducted or withheld with respect to the making of such payments under any applicable law. To the extent that any amounts are so deducted or withheld, such deducted or withheld amounts shall be treated for purposes of this Indenture as having been paid to the person in respect of which such deduction or withholding was made.

Section 4.02. Maintenance of Office or Agency. The Company will maintain in the contiguous United States of America an office or agency where the Notes may be surrendered for registration of transfer or exchange or presented for payment or repurchase ("Paying Agent") or for conversion ("Conversion Agent") and where notices and demands to or upon the Company in respect of the Notes and this Indenture may be served. The Company will give prompt written notice to the Trustee and the Paying Agent (if other than the Trustee) of the location, and any change in the location, of such office or agency. If at any time the Company shall fail to maintain any such required office or agency or shall fail to furnish the Trustee with the address thereof, such presentations, surrenders, notices and demands may be made or served at the Corporate Trust Office or the office or agency of the Trustee in the contiguous United States of America.

The Company may also from time to time designate as co-Note Registrars one or more other offices or agencies where the Notes may be presented or surrendered for any or all such purposes and may from time to time rescind such designations; provided that no such designation or rescission shall in any manner relieve the Company of its obligation to maintain an office or

agency in the contiguous United States of America for such purposes. The Company will give prompt written notice to the Trustee and the Paying Agent (if other than the Trustee) of any such designation or rescission and of any change in the location of any such other office or agency. The terms "Paying Agent" and "Conversion Agent" include any such additional or other offices or agencies, as applicable.

The Company hereby initially designates the Trustee as the Paying Agent, Note Registrar, Custodian and Conversion Agent and the Corporate Trust Office as the office or agency in the contiguous United States of America where Notes may be surrendered for registration of transfer or exchange or presented for payment or repurchase or for conversion and where notices and demands to or upon the Company in respect of the Notes and this Indenture may be served.

Section 4.03. Appointments to Fill Vacancies in Trustee's Office. The Company, whenever necessary to avoid or fill a vacancy in the office of Trustee, will appoint, in the manner provided in Section 7.09, a Trustee, so that there shall at all times be a Trustee hereunder.

Section 4.04. Provisions as to Paying Agent. (a) If the Company shall appoint a Paying Agent other than the Trustee, the Company will cause such Paying Agent to execute and deliver to the Trustee an instrument in which such agent shall agree with the Trustee, subject to the provisions of this Section 4.04:

- (i) that it will hold all sums held by it as such agent for the payment of the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, and accrued interest that has not been paid or capitalized on, the Notes in trust for the benefit of the Holders of the Notes;
- (ii) that it will give the Trustee prompt notice of any failure by the Company to make any payment of the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, and accrued interest that has not been paid or capitalized on, the Notes when the same shall be due and payable; and
- (iii) that at any time during the continuance of an Event of Default, upon request of the Trustee, it will forthwith pay to the Trustee all sums so held in trust.

The Company shall, on or before each due date of the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, or accrued interest that has not been paid or capitalized on, the Notes, deposit with the Paying Agent a sum in immediately available U.S. Dollars sufficient to pay such principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) or accrued interest that has not been paid or capitalized, and (unless such Paying Agent is the Trustee) the Company will promptly notify the Trustee of any failure to take such action; *provided* that if such deposit is made on the due date, such deposit must be received by the Paying Agent by 10:00 a.m., New York City time, on such date, Company during the seven-day revocation period.

(b) If the 3. **Company shall act as Release of Executive.** Company, on its own Paying Agent, it will, behalf and on behalf of its divisions, subsidiaries, parents, or before affiliated corporations, past and present, and each due date of the principal (including the Redemption Price them, as well as each of its and the Fundamental Change Repurchase

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Price, if applicable) of, and accrued interest that has not been paid their assignees, successors, directors, officers, stockholders, partners, representatives, insurers, attorneys, agents or capitalized on, the Notes, set aside, segregate and hold in trust for the benefit of the Holders of the Notes a sum sufficient to pay such principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) and accrued interest that has not been paid employees, past or capitalized so becoming due and will promptly notify the Trustee of any failure to take such action and of any failure by the Company to make any payment of the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, or accrued interest that has not been paid or capitalized on, the Notes when the same shall become due and payable.

(c) Anything in this Section 4.04 to the contrary notwithstanding, the Company may, at any time, for the purpose of obtaining a satisfaction and discharge of this Indenture, or for any other reason, pay, cause to be paid or deliver to the Trustee all sums or amounts held in trust by the Company present, or any Paying Agent hereunder as required by this Section 4.04, such sums or amounts to be held by the Trustee upon the trusts herein contained of them (individually and upon such payment or delivery by the Company or any Paying Agent to the Trustee, the Company or such Paying Agent shall be released collectively), hereby releases Executive from all further liability but only with respect to such sums or amounts. Upon the occurrence of any event specified in Section 6.01(h) or Section 6.01(i), the Trustee shall automatically become the Paying Agent.

(d) Any money and shares of Common Stock deposited with the Trustee or any Paying Agent, or then held by the Company, in trust for the payment of the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, accrued interest that has not been paid or capitalized on and the consideration due upon conversion of any Note and remaining unclaimed for two years after such principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable), interest or consideration due upon conversion has become due and payable shall be paid to the Company on request of the Company contained in an Officer's Certificate, or (if then held by the Company) shall be discharged from such trust; and the Holder of such Note shall thereafter, as an unsecured general creditor, look only to the Company and the Guarantors for payment thereof, and all liability of the Trustee or such Paying Agent with respect to such trust money and shares of Common Stock, and all liability of the Company as trustee thereof, shall thereupon cease.

Section 4.05. Existence. Subject to Article 11, the Company shall do or cause to be done all things necessary to preserve and keep in full force and effect its corporate existence.

Section 4.06. Rule 144A Information Requirement and Annual Reports. (a) At any time the Company is not subject to Section 13 or 15(d) of the Exchange Act, the Company shall, so long as any of the Notes or any shares of Common Stock issuable upon conversion thereof shall, at such time, constitute "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act, promptly provide to the Trustee and will, upon written request, provide to any Holder, beneficial owner or prospective purchaser of such Notes or any shares of Common Stock issuable upon conversion of such Notes, the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act to facilitate the resale of such Notes or shares of Common Stock pursuant to Rule 144A.

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(b) The Company shall deliver to the Trustee, within 15 days after the same are required to be filed with the Commission (giving effect to any grace period provided by Rule 12b-25 (or any successor rule) under the Exchange Act), copies of any documents or reports that the Company is required to file with the Commission pursuant to Section 13 or 15(d) of the Exchange Act (excluding any such information, documents or reports, or portions thereof, subject to confidential treatment and any correspondence with the Commission). Any such document or report that the Company files with the Commission via the Commission's EDGAR system (or any successor thereto) shall be deemed to be delivered to the Trustee for purposes of this Section 4.06(b) at the time such documents are filed via the EDGAR system (or any successor thereto), it being understood that the Trustee shall not be responsible for determining whether such filings have been made.

(c) Delivery of the reports and documents described in subsection (b) above to the Trustee is for informational purposes only, and the Trustee's receipt of such shall not constitute constructive notice of any information contained therein or determinable from information contained therein, including the Company's and the Guarantors' compliance with any of their respective covenants hereunder (as to which the Trustee is entitled to conclusively rely on an Officer's Certificate).

(d) If, at any time during the period from, and including, the date that is six months after the Last Date of Original Issuance of any Note, the Company has not satisfied the reporting conditions (including, for the avoidance of doubt, the requirement for current Form 10 information) set forth in Rule 144(c) and (i)(2) under the Securities Act, or the Notes are not otherwise freely tradable pursuant to Rule 144 by Holders other than the Company's Affiliates or Holders that were the Company's Affiliates at any time during the three months immediately preceding (as a result of restrictions pursuant to U.S. securities laws or the terms of this Indenture or the Notes), the Company shall pay Additional Interest on the Notes. Such Additional Interest shall accrue on the Notes at the rate of 0.50% per annum of the Capitalized Principal Amount of the Notes outstanding for each day during such period on which the condition requiring such Additional Interest is continuing. As used in this Section 4.06(d), documents or reports that the Company is required to "file" with the Commission pursuant to Section 13 or 15(d) of the Exchange Act do not include documents or reports that the Company furnishes to the Commission pursuant to Section 13 or 15(d) of the Exchange Act.

(e) [Reserved.]

(f) Additional Interest will be payable in arrears on each Interest Payment Date following accrual in the same manner as regular interest on the Notes.

(g) The Additional Interest that is payable in accordance with Section 4.06(d) shall be in addition to any Additional Interest that may accrue on the Notes as a result of the Company's election pursuant to Section 6.03.

(h) If Additional Interest is payable by the Company pursuant to Section 4.06(d), the Company shall deliver to the Trustee an Officer's Certificate to that effect stating (i) the amount of such Additional Interest that is payable and (ii) the date on which such Additional Interest is

payable. Unless and until a Responsible Officer of the Trustee receives at the Corporate Trust Office such a certificate, the Trustee may assume without inquiry that no such Additional Interest is payable. If the Company has paid Additional Interest directly to the Persons entitled to it, the Company shall deliver to the Trustee an Officer's Certificate setting forth the particulars of such payment.

(i) For the avoidance of doubt, in the event additional Notes are issued under this Indenture pursuant to Section 2.10 and such additional Notes are Restricted Securities, for purposes of determining whether Additional Interest shall be payable pursuant to Section 4.06(d) with respect to any Notes issued under this Indenture, all Notes that were not issued with the same CUSIP number shall be considered separately.

Section 4.07. Stay, Extension and Usury Laws. Each of the Company and each Guarantor covenants (to the extent that it may lawfully do so) that it shall not at any time insist upon, plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay, extension or usury law or other law that would prohibit or forgive the Company from paying all or any portion of the principal of or interest on the Notes as contemplated herein, wherever enacted, now or at any time hereafter in force, or that may affect the covenants or the performance of this Indenture; and the Company (to the extent it may lawfully do so) hereby expressly waives all benefit or advantage of any such law, and covenants that it will not, by resort to any such law, hinder, delay or impede the execution of any power herein granted to the Trustee, but will suffer and permit the execution of every such power as though no such law had been enacted.

Section 4.08. Compliance Certificate; Statements as to Defaults. The Company shall deliver to the Trustee within 120 days after the end of each fiscal year of the Company (beginning with the fiscal year ending on December 31, 2023) an Officer's Certificate stating whether the signers thereof have knowledge of any failure by the Company to comply with all conditions and covenants then required to be performed under this Indenture and, if so, specifying each such failure and the nature thereof.

In addition, the Company shall deliver to the Trustee, as soon as possible, and in any event within 30 days after the occurrence of any Event of Default or Default, an Officer's Certificate setting forth the details of such Event of Default or Default, its status and the action that the Company is taking or proposing to take in respect thereof; *provided* that the Company will not be required to deliver such notice if such Event of Default or Default is no longer continuing or has been cured.

Section 4.09. Further Instruments and Acts. Upon request of the Trustee, the Company will execute and deliver such further instruments and do such further acts as may be reasonably necessary or proper to carry out the purposes of this Indenture.

Section 4.10. Limitation on Secured Debt. The Company will not, and will not permit any of its Subsidiaries to, create, incur, assume or otherwise cause or permit to exist any Lien securing Debt on any of their properties or assets, now owned or hereafter acquired, other than Permitted Liens; *provided, however*, the Company and its Subsidiaries will be permitted to incur

Debt secured by Liens if after giving effect to the incurrence of such Debt, the aggregate amount of all Debt of the Company and its Subsidiaries secured by Liens (not including Permitted Liens) does not exceed \$500.0 million. Notwithstanding the foregoing, this Section 4.10 shall be of no further force or effect if the Last Reported Sale Price of the Common Stock has been at least \$20.00 (as appropriately adjusted for stock splits, stock combinations, stock dividends and stock distributions in a manner consistent with the adjustments to the Conversion Rate set forth in Section 14.04) for at least 20 Trading Days (whether or not consecutive) during any 30 consecutive Trading Day period (including the last Trading Day of such period).

Section 4.11. Limitation on Subsidiary Guarantees. The Company will not permit any of its Subsidiaries, directly or indirectly, to Guarantee any Debt, other than (a) Guarantees of Notes permitted by Section 2.01 of this Indenture (so long as such Subsidiary has Guaranteed all Notes issued under this Indenture), (b) Guarantees of any Debt not specified in clause (a) above or clause (c) below so long as such Guarantees are permitted under the Existing Indentures and such Subsidiary has Guaranteed the Notes, and (c) Guarantees pursuant to contractual obligations existing as of April 11, 2023 (which, for the avoidance of doubt, shall include any Guarantee of Debt of Nikola Ivec Europe GmbH).

Section 4.12. Limitation on Sales of Equity Interests of Subsidiary Guarantors. The Company will not, and will not permit any of its Subsidiaries that have Guaranteed the Notes, directly or indirectly, to sell or transfer, including by merger, consolidation or otherwise, any Equity Interests of any Subsidiary that has Guaranteed the Notes except for any sale or disposition of all of such Subsidiary's Equity Interests.

ARTICLE 5

LISTS OF HOLDERS AND REPORTS BY THE COMPANY AND THE TRUSTEE

Section 5.01. Lists of Holders. The Company covenants and agrees that it will furnish or cause to be furnished to the Trustee, semi-annually, not more than 15 days after each June 15 and December 15 in each year beginning with December 15, 2023, and at such other times as the Trustee may request in writing, within 30 days after receipt by the Company of any such request (or such lesser time as the

Trustee may reasonably request in order to enable it to timely provide any notice to be provided by it hereunder), a list in such form as the Trustee may reasonably require of the names and addresses of the Holders as of a date not more than 15 days (or such other date as the Trustee may reasonably request in order to so provide any such notices) prior to the time such information is furnished, except that no such list need be furnished so long as the Trustee is acting as Note Registrar.

Section 5.02. *Preservation and Disclosure of Lists.* The Trustee shall preserve, in as current a form as is reasonably practicable, all information as to the names and addresses of the Holders contained in the most recent list furnished to it as provided in Section 5.01 or maintained by the Trustee in its capacity as Note Registrar, if so acting. The Trustee may destroy any list furnished to it as provided in Section 5.01 upon receipt of a new list so furnished.

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ARTICLE 6
DEFAULTS AND REMEDIES

Section 6.01. *Events of Default.* Each of the following events shall be an “**Event of Default**” with respect to the Notes:

- (a) default in any payment of interest on any Note when due and payable, and the default continues for a period of 30 days;
- (b) default in the payment of principal of any Note when due and payable on the Maturity Date, upon Optional Redemption, upon any required repurchase, upon declaration of acceleration or otherwise;
- (c) failure by the Company to comply with its obligation to convert the Notes in accordance with this Indenture upon exercise of a Holder’s conversion right, and such failure continues for a period of five (5) Business Days;
- (d) failure by the Company to issue (i) a Fundamental Change Company Notice when due in accordance with Section 15.02(c) and such failure continues for a period of five (5) Business Days or (ii) notice of a specified corporate transaction or event in accordance with Section 14.01(b)(ii) or (iii) when due;
- (e) failure by the Company or any Guarantor to comply with its obligations under Article 11;
- (f) failure by the Company or any Guarantor for 60 days after written notice from the Trustee or the Holders of at least 25% in aggregate principal amount of the Notes then outstanding has been received by the Company to comply with any of its other agreements contained in the Notes or this Indenture;
- (g) default by the Company, any Guarantor or any Significant Subsidiary of the Company with respect to any mortgage, agreement or other instrument under which there may be outstanding, or by which there may be secured or evidenced, any indebtedness for money borrowed in excess of \$30,000,000 (or its foreign currency equivalent) in the aggregate of the Company, the Guarantor and/or any such Significant Subsidiary, whether such indebtedness now exists or shall hereafter be created (i) resulting in such indebtedness becoming or being declared due and payable prior to its stated maturity or (ii) constituting a failure to pay the principal of any such indebtedness when due and payable (after the expiration of all applicable grace periods) at its stated maturity, upon required repurchase, upon declaration of acceleration or otherwise and, in each such case, such indebtedness is not discharged, or such acceleration is not otherwise cured or rescinded, within 30 days (or, in the case of clause (ii) above, within the greater of (x) 30 days or (y) the duration of any grace period or extension of time for payment applicable thereto);
- (h) the Company, any Guarantor or any Significant Subsidiary shall commence a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to the Company, any Guarantor or any such Significant Subsidiary or its debts under any

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bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of the Company, any Guarantor or any such Significant Subsidiary or any substantial part of its property, or shall consent to any such relief or to the appointment of or taking possession by any such official in an involuntary case or other proceeding commenced against it, or shall make a general assignment for the benefit of creditors, or shall fail generally to pay its debts as they become due;

(i) an involuntary case or other proceeding shall be commenced against the Company, any Guarantor or any Significant Subsidiary seeking liquidation, reorganization or other relief with respect to the Company, any Guarantor or such Significant Subsidiary or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of the Company, any Guarantor or such Significant Subsidiary or any substantial part of its property, and such involuntary case or other proceeding shall remain undismissed and unstayed for a period of 30 consecutive days;

(j) failure by the Company, any Guarantor or a Significant Subsidiary to pay final judgments aggregating in excess of \$30,000,000 (or its foreign currency equivalent) other than any judgments covered by indemnities provided by, or insurance policies issued by, reputable and creditworthy companies, which final judgments remain unpaid, undischarged and unstayed for a period of more than 60 days after such judgment becomes final (with no right to appeal thereof), and in the event such judgment is covered by insurance, an enforcement proceeding has been commenced by any creditor upon such judgment or decree which is not promptly stayed; or

(k) except as permitted by this Indenture, the Note Guarantee of any Guarantor ceases to be in full force and effect, or such Guarantor denies or disaffirms in writing its obligations under this Indenture or its Note Guarantee, in each case, other than any such cessation, denial or disaffirmation in connection with a termination of such Note Guarantee pursuant to Article 13.

Section 6.02. Acceleration; Rescission and Annulment. If one or more Events of Default shall have occurred and be continuing (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body), then, and in each and every such case (other than an Event of Default specified in Section 6.01(h) or Section 6.01(i) with respect to the Company), unless the principal of all of the Notes shall have already become due and payable, either the Trustee or the Holders of at least 25% in aggregate principal amount of the Notes then outstanding determined in accordance with Section 8.04, by notice in writing to the Company (and to the Trustee if given by Holders), may (and the Trustee, at the written request of such Holders, shall) declare 100% of the Capitalized Principal Amount of, and accrued interest that has not been paid or capitalized on, all the Notes to be due and payable immediately, and upon any such declaration the same shall become and shall automatically be immediately due and payable, anything in this Indenture or in the Notes contained to the contrary notwithstanding. If an Event of Default specified in Section 6.01(h) or Section 6.01(i) with respect to the Company occurs and is continuing, 100% of the Capitalized Principal Amount of, and accrued interest that has not been paid or capitalized, if any, on, all Notes shall become and shall automatically be immediately due and payable

without any declaration or other act on the part of the Trustee or any Holder. Notwithstanding the foregoing, if any of the Notes have been accelerated but such payments have not been made before the date that the Company would be required to provide a Fundamental Change Company Notice for a Change in Control Transaction pursuant to Section 15.02, then the amounts due upon acceleration provided above shall be adjusted by replacing "100%" with "130%." Without limiting the generality of the foregoing, it is understood and agreed that if the Notes are accelerated or otherwise become due prior to their stated maturity, in each case, in respect of any Event of Default (including an Event of Default under Section 6.01(h) or Section 6.01(i)) (each an "Acceleration Event"), the premium provided in the foregoing shall also be due and payable in full at the time of such Acceleration Event and shall constitute part of the Obligations payable to Holders of the Notes in view of the impracticability and extreme difficulty of ascertaining actual damages and by mutual agreement of the parties as to a reasonable calculation of each Holder's loss as a result thereof. If the premium becomes due and payable, it shall be deemed to be principal of the Notes, and interest shall accrue on the full principal amount of the Notes (including the premium) from and after the applicable triggering event, including in connection with an Event of Default under Section 6.01(h) or Section 6.01(i). Any premium payable above shall be presumed to be the liquidated damages sustained by each Holder of the Notes as the result of the acceleration of the Notes and the Company agrees that it is reasonable under the circumstances currently existing. THE COMPANY EXPRESSLY WAIVES (TO THE FULLEST EXTENT IT MAY LAWFULLY DO SO) THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE FOREGOING PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION. The Company expressly agrees (to the fullest extent it may lawfully do so) that: (A) the premium is

reasonable and is the product of an arm's length transaction between sophisticated business people, ably represented by counsel; (B) the premium shall be payable notwithstanding the then prevailing market rates at the time acceleration occurs; (C) there has been a course of conduct between the Holders of the Notes and the Company giving specific consideration in this transaction for such agreement to pay the premium; and (D) the Company shall be estopped hereafter from claiming differently than as agreed to in this paragraph. The Company expressly acknowledges that its agreement to pay the premium to the Holders of the Notes as herein described is a material inducement to the Holders to purchase the Notes.

The immediately preceding paragraph, however, is subject to the conditions that if, at any time after the principal of the Notes shall have been so declared due and payable, and before any judgment or decree for the payment of the monies due shall have been obtained or entered as hereinafter provided, the Company shall pay or shall deposit with the Trustee a sum sufficient to pay installments of accrued interest that has not been paid or capitalized upon all Notes and the principal of any and all Notes that shall have become due otherwise than by acceleration (with interest on overdue installments of accrued interest that has not been paid or capitalized, claims, agreements, obligations, demands and on such principal at the Cash Interest Rate borne by the Notes at such time) and amounts due to the Trustee pursuant to Section 7.06, and if (1) rescission would not conflict with any judgment or decree of a court of competent jurisdiction and (2) any and all existing Events of Default under this Indenture, other than the nonpayment of the principal of and accrued interest that has not been paid or capitalized, if any, on Notes that shall have become due solely by such acceleration, shall have been cured or waived pursuant to Section 6.09, then and in every such case (except as provided in the immediately preceding sentence) the Holders of a majority in aggregate

principal amount of the Notes then outstanding, by written notice to the Company and to the Trustee, may waive all Defaults or Events of Default with respect to the Notes and rescind and annul such declaration and its consequences and such Default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured for every purpose of this Indenture; but no such waiver or rescission and annulment shall extend to or shall affect any subsequent Default or Event of Default, or shall impair any right consequent thereon. Notwithstanding anything to the contrary herein, no such waiver or rescission and annulment shall extend to or shall affect any Default or Event of Default resulting from (i) the nonpayment of the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, or accrued interest that has not been paid or capitalized on, any Notes, (ii) a failure to repurchase any Notes when required or (iii) a failure to pay or deliver, as the case may be, the consideration due upon conversion of the Notes.

Section 6.03. Additional Interest. Notwithstanding anything in this Indenture or in the Notes to the contrary, to the extent the Company elects, the sole remedy for an Event of Default relating to the Company's failure to comply with its obligations as set forth in Section 4.06(b) shall, for the first 360 days after the occurrence of such an Event of Default, consist exclusively of the right to receive Additional Interest on the Notes at a rate equal to (i) 0.25% per annum of the Capitalized Principal Amount of the Notes outstanding for each day during the first 180 calendar days after the occurrence of such an Event of Default during which such an Event of Default is continuing (or, if earlier, the date on which such Event of Default is cured or waived as provided for in this Indenture) and (ii) 0.50% per annum of the Capitalized Principal Amount of the Notes outstanding for each day from, and including, the 181st calendar day to, but excluding, the 360th calendar day following the occurrence of such an Event of Default, in each case, during which such Event of Default is continuing (or, if earlier, the date on which such Event of Default is cured or waived as provided for in this Indenture). Additional Interest payable pursuant to this Section 6.03 shall be in addition to, not in lieu of, any Additional Interest payable pursuant to Section 4.06(d). If the Company so elects, such Additional Interest shall be payable in the same manner and on the same dates as the stated interest payable on the Notes. On the 361st day after such an Event of Default (if the Event of Default relating to the Company's failure to comply with its obligations as set forth in Section 4.06(b) is not cured or waived prior to such 361st day), the Notes shall be subject to acceleration as provided in Section 6.02. The provisions of this paragraph will not affect the rights of Holders in the event of the occurrence of any Event of Default other than the Company's failure to comply with its obligations as set forth in Section 4.06(b). In the event the Company does not elect to pay Additional Interest following an Event of Default in accordance with this Section 6.03 or the Company elected to make such payment but does not pay the Additional Interest when due, the Notes shall be immediately subject to acceleration as provided in Section 6.02.

In order to elect to pay Additional Interest as the sole remedy during the first 360 days after the occurrence of an Event of Default relating to the Company's failure to comply with its obligations as set forth in Section 4.06(b) in accordance with the immediately preceding paragraph, the Company must notify all Holders, the Trustee and the Paying Agent (if other than the Trustee), in writing, of such election prior to the beginning of such 360-day period. Upon the Company's failure to timely give such notice, the Notes shall be immediately subject to acceleration as provided in Section 6.02.

Section 6.04. Payments of Notes on Default; Suit Therefor. If an Event of Default described in clause (a) or (b) of Section 6.01 shall have occurred and be continuing, the Company shall, upon demand of the Trustee, pay to the Trustee, for the benefit of the Holders of the Notes, the whole amount then due and payable on the Notes for principal and interest, if any, with interest on any overdue principal and interest, if any, at the Cash Interest Rate borne by the Notes at such time, and, in addition thereto, such further amount as shall be sufficient to cover any amounts due to the Trustee under Section 7.06. If the Company shall fail to pay such amounts forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, may institute a judicial proceeding for the collection of the sums so due and unpaid, may prosecute such proceeding to judgment or final decree and may enforce the same against the Company or any other obligor upon the Notes and collect the moneys adjudged or decreed to be payable in the manner provided by law out of the property of the Company or any other obligor upon the Notes, wherever situated.

In the event there shall be pending proceedings for the bankruptcy or for the reorganization of the Company or any other obligor on the Notes under Title 11 of the United States Code, or any other applicable law, or in case a receiver, assignee or trustee in bankruptcy or reorganization, liquidator, sequestrator or similar official shall have been appointed for or taken possession of the Company or such other obligor, the property of the Company or such other obligor, or in the event of any other judicial proceedings relative to the Company or such other obligor upon the Notes, or to the creditors or property of the Company or such other obligor, the Trustee, irrespective of whether the principal of the Notes shall then be due and payable as therein expressed or by declaration or otherwise and irrespective of whether the Trustee shall have made any demand pursuant to the provisions of this Section 6.04, shall be entitled and empowered, by intervention in such proceedings or otherwise, to file and prove a claim or claims for the whole amount of principal and accrued interest that has not been paid or capitalized, if any, in respect of the Notes, and, in case of any judicial proceedings, to file such proofs of claim and other papers or documents and to take such other actions as it may deem necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel) and of the Holders allowed in such judicial proceedings relative to the Company or any other obligor on the Notes, its or their creditors, or its or their property, and to collect and receive any monies or other property payable or deliverable on any such claims, and to distribute the same after the deduction of any amounts due to the Trustee under Section 7.06; and any receiver, assignee or trustee in bankruptcy or reorganization, liquidator, custodian or similar official is hereby authorized by each of the Holders to make such payments to the Trustee, as administrative expenses, and, in the event that the Trustee shall consent to the making of such payments directly to the Holders, to pay to the Trustee any amount due it for reasonable compensation, expenses, advances and disbursements, including agents and counsel fees, and including any other amounts due to the Trustee under Section 7.06, incurred by it up to the date of such distribution. To the extent that such payment of reasonable compensation, expenses, advances and disbursements out of the estate in any such proceedings shall be denied for any reason, payment of the same shall be secured by a lien on, and shall be paid out of, any and all distributions, dividends, monies, securities and other property that the Holders of the Notes may be entitled to receive in such proceedings, whether in liquidation or under any plan of reorganization or arrangement or otherwise.

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Nothing herein contained shall be deemed to authorize the Trustee to authorize or consent to or accept or adopt on behalf of any Holder any plan of reorganization, arrangement, adjustment or composition affecting such Holder or the rights of any Holder thereof, or to authorize the Trustee to vote in respect of the claim of any Holder in any such proceeding.

All rights causes of action, and of asserting claims under this Indenture, known or under any of the Notes, may be enforced by the Trustee without the possession of any of the Notes, unknown, suspected or the production thereof at any trial or other proceeding relative thereto, and any such suit or proceeding instituted by the Trustee shall be brought in its own name as trustee of an express trust, and any recovery of judgment shall, after provision for the payment of the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, be for the ratable benefit of the Holders of the Notes.

In any proceedings brought by the Trustee (and in any proceedings involving the interpretation of any provision of this Indenture to which the Trustee shall be a party) the Trustee shall be held to represent all the Holders of the Notes, and it shall not be necessary to make any Holders of the Notes parties to any such proceedings.

In case the Trustee shall have proceeded to enforce any right under this Indenture and such proceedings shall have been discontinued or abandoned because of any waiver pursuant to Section 6.09 or any rescission and annulment pursuant to Section 6.02 or for any other reason or shall have been determined adversely to the Trustee, then and in every such case the Company, the Guarantors, the Holders and the Trustee shall, subject to any determination in such proceeding, be restored respectively to their several positions and rights hereunder, and all rights, remedies and powers of the Company, the Guarantors, the Holders and the Trustee shall continue as though no such proceeding had been instituted.

Section 6.05. Application of Monies Collected by Trustee. Any monies or property collected by the Trustee pursuant to this Article 6 with respect to the Notes shall be applied in the following order, at the date or dates fixed by the Trustee for the distribution of such monies, upon presentation of the several Notes, and stamping thereon the payment, if only partially paid, and upon surrender thereof, if fully paid:

First, to the payment of all amounts due the Trustee under Section 7.06;

Second, in case the principal of the outstanding Notes shall not have become due and be unpaid, to the payment of interest on, and any cash due upon conversion of, the Notes in default in the order of the date due of the payments of such interest and cash due upon conversion, as the case may be, with interest (to the extent that such interest has been collected by the Trustee) upon such overdue payments at the Cash Interest Rate borne by the Notes at such time, such payments to be made ratably to the Persons entitled thereto;

Third, in case the principal of the outstanding Notes shall have become due, by declaration or otherwise, and be unpaid to the payment of the whole amount (including, if applicable, the payment of the Redemption Price, the Fundamental Change Repurchase Price and any cash due upon conversion) then owing and unpaid upon the Notes for principal and interest,

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if any, with interest on the overdue principal and, to the extent that such interest has been collected by the Trustee, upon overdue installments of interest at the Cash Interest Rate borne by the Notes at such time, and in case such monies shall be insufficient to pay in full the whole amounts so due and unpaid upon the Notes, then to the payment of such principal (including, if applicable, the Redemption Price, the Fundamental Change Repurchase Price and any cash due upon conversion) and interest without preference or priority of principal over interest, or of interest over principal or of any installment of interest over any other installment of interest, or of any Note over any other Note, ratably to the aggregate of such principal (including, if applicable, the Redemption Price, the Fundamental Change Repurchase Price and any cash due upon conversion) and accrued interest that has not been paid or capitalized; and

Fourth, to the payment of the remainder, if any, to the Company.

Section 6.06. Proceedings by Holders. Except to enforce the right to receive payment of principal (including, if applicable, the Redemption Price and the Fundamental Change Repurchase Price) or interest when due, or the right to receive payment or delivery of the consideration due upon conversion, no Holder of any Note shall have any right by virtue of or by availing of any provision of this Indenture to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Indenture, or for the appointment of a receiver, trustee, liquidator, custodian or other similar official, or for any other remedy hereunder, unless:

- (a) such Holder previously shall have given to the Trustee written notice of an Event of Default and of the continuance thereof, as herein provided;
- (b) Holders of at least 25% in aggregate principal amount of the Notes then outstanding shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder;
- (c) such Holders shall have offered to the Trustee such security or indemnity reasonably satisfactory to it against any loss, liability or expense to be incurred therein or thereby;
- (d) the Trustee for 60 days after its receipt of such notice, request and offer of such security or indemnity, shall have neglected or refused to institute any such action, suit or proceeding; and

(e) no direction that, in the opinion of the Trustee, is inconsistent with such written request shall have been given to the Trustee by the Holders of a majority of the aggregate principal amount of the Notes then outstanding within such 60-day period pursuant to Section 6.09;

it being understood and intended, and being expressly covenanted by the Holder of every Note with every other Holder and the Trustee that no one or more Holders shall have any right in any manner whatever by virtue of or by availing of any provision of this Indenture to affect, disturb or prejudice the rights of any other Holder, or to obtain or seek to obtain priority over or preference to any other such Holder, or to enforce any right under this Indenture, except in the manner herein provided and for the equal, ratable and common benefit of all Holders (except as

otherwise provided herein). For the protection and enforcement of this Section 6.06, each and every Holder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

Notwithstanding any other provision of this Indenture and any provision of any Note, the right of each Holder to receive payment or delivery, as the case may be, of (x) the principal (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable) of, (y) accrued interest that has not been paid or capitalized, if any, on, and (z) the consideration due upon conversion of, such Note, on or after the respective due dates expressed or provided for in such Note or in this Indenture, or to institute suit for the enforcement of any such payment or delivery, as the case may be, shall not be impaired or affected without the consent of such Holder.

Section 6.07. Proceedings by Trustee. In case of an Event of Default of which a Responsible Officer of the Trustee has been notified in writing, the Trustee may in its discretion proceed to protect and enforce the rights vested in it by this Indenture by such appropriate judicial proceedings as are necessary to protect and enforce any of such rights, either by suit in equity or by action at law or by proceeding in bankruptcy or otherwise, whether for the specific enforcement of any covenant or agreement contained in this Indenture or in aid of the exercise of any power granted in this Indenture, or to enforce any other legal or equitable right vested in the Trustee by this Indenture or by law.

Section 6.08. Remedies Cumulative and Continuing. Except as provided in the last paragraph of Section 2.06, all powers and remedies given by this Article 6 to the Trustee or to the Holders shall, to the extent permitted by law, be deemed cumulative and not exclusive of any thereof or of any other powers and remedies available to the Trustee or the Holders of the Notes, by judicial proceedings or otherwise, to enforce the performance or observance of the covenants and agreements contained in this Indenture, and no delay or omission of the Trustee or of any Holder of any of the Notes to exercise any right or power accruing upon any Default or Event of Default shall impair any such right or power, or shall be construed to be a waiver of any such Default or Event of Default or any acquiescence therein; and, subject to the provisions of Section 6.06, every power and remedy given by this Article 6 or by law to the Trustee or to the Holders may be exercised from time to time, and as often as shall be deemed expedient, by the Trustee or by the Holders.

Section 6.09. Direction of Proceedings and Waiver of Defaults by Majority of Holders. The Holders of a majority of the aggregate principal amount of the Notes at the time outstanding determined in accordance with Section 8.04 shall have the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee with respect to the Notes or the Note Guarantees; *provided, however,* that the Trustee may refuse to follow any such direction or take any action that conflicts with any rule of law or with this Indenture, or that, subject to the terms of this Indenture, the Trustee determines may be unduly prejudicial to the rights of other Holders or may involve the Trustee in liability (it being expressly understood that the Trustee shall not have an affirmative duty to ascertain whether such action is prejudicial), unless the Trustee is offered security and indemnity satisfactory to the Trustee against any loss, claim, liability, cost or

expense to the Trustee that may result from the Trustee's following such direction. The Holders of a majority in aggregate principal amount of the Notes at the time outstanding determined in accordance with Section 8.04 may on behalf of the Holders of all of the Notes waive any past Default or Event of Default hereunder and its consequences except (i) a default in the payment of accrued interest that has not been paid or capitalized, if any, on, or the principal (including any Redemption Price, any Fundamental Change Repurchase Price) of, the Notes when due that has not been cured pursuant to the provisions of Section 6.01, (ii) a failure by the Company or any Guarantor to pay or deliver, as the case may be, the consideration due upon conversion of the Notes or (iii) a default in respect of a covenant or provision hereof which under Article 10 cannot be modified or amended without the consent of each Holder of an outstanding Note affected. Upon any such waiver the Company, the Guarantors, the Trustee and the Holders of the Notes shall be restored to their former positions and rights hereunder; but no such waiver shall extend to any subsequent or other Default or Event of Default or impair any right consequent thereon. Whenever any Default or Event of Default hereunder shall have been waived as permitted by this Section 6.09, said Default or Event of Default shall for all purposes of the Notes and this Indenture be deemed to have been cured and to be not continuing; but no such waiver shall extend to any subsequent or other Default or Event of Default or impair any right consequent thereon.

Section 6.10. *Notice of Defaults.* The Trustee shall, within 90 days after the occurrence and continuance of a Default of which a Responsible Officer of the Trustee has actual knowledge, deliver to all Holders notice of all Defaults known to a Responsible Officer, unless such Defaults shall have been cured or waived before the giving of such notice; *provided* that, except in the case of a Default in the payment of the principal of (including the Redemption Price and the Fundamental Change Repurchase Price, if applicable), or accrued interest that has not been paid or capitalized on, any of the Notes or a Default in the payment or delivery of the consideration due upon conversion, the Trustee shall be protected in withholding such notice if and so long as a committee of Responsible Officers of the Trustee in good faith determines that the withholding of such notice is in the interests of the Holders.

Section 6.11. *Undertaking to Pay Costs.* All parties to this Indenture agree, and each Holder of any Note by its acceptance thereof shall be deemed to have agreed, that any court may, in its discretion, require, in any suit for the enforcement of any right or remedy under this Indenture, or in any suit against the Trustee for any action taken or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees and expenses, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant; *provided* that the provisions of this Section 6.11 (to the extent permitted by law) shall not apply to any suit instituted by the Trustee, to any suit instituted by any Holder, or group of Holders, holding in the aggregate more than 10% in principal amount of the Notes at the time outstanding determined in accordance with Section 8.04, or to any suit instituted by any Holder for the enforcement of the payment of the principal of or accrued interest that has not been paid or capitalized, if any, on any Note (including, but not limited to, the Redemption Price and the Fundamental Change Repurchase Price, if applicable) on or after the due date expressed or provided for in such Note or to any suit for the enforcement

of the right to convert any Note, or receive the consideration due upon conversion, in accordance with the provisions of Article 14.

ARTICLE 7
CONCERNING THE TRUSTEE

Section 7.01. *Duties and Responsibilities of Trustee.* The Trustee, prior to the occurrence of an Event of Default and after the curing or waiver of all Events of Default that may have occurred, undertakes to perform such duties and only such duties as are specifically set forth in this Indenture. In the event an Event of Default has occurred and is continuing, of which a Responsible Officer of the Trustee has been notified in writing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in its exercise, as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs; *provided* that if an Event of Default occurs and is continuing, the Trustee will be under no obligation to exercise any of the rights or powers

under this Indenture at the request or direction of any of the Holders unless such Holders have offered to the Trustee indemnity or security reasonably satisfactory to it against any loss, liability, claim, cost or expense that might be incurred by it in compliance with such request or direction.

No provision of this Indenture shall be construed to relieve the Trustee from liability for its own grossly negligent action, its own grossly negligent failure to act or its own willful misconduct, except that:

(a) prior to the occurrence of an Event of Default and after the curing or waiving of all Events of Default that may have occurred:

(i) the duties and obligations of the Trustee shall be determined solely by the express provisions of this Indenture, and the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Indenture and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(ii) in the absence of gross negligence or willful misconduct on the part of the Trustee, as determined in a final and non-appealable decision by a court of competent jurisdiction, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture; but, in the case of any such certificates or opinions that by any provisions hereof are specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not they conform to the requirements of this Indenture (but need not confirm or investigate the accuracy of any mathematical calculations or other facts stated therein (and, for the avoidance of doubt, the Trustee is not obligated to make or confirm any calculations called for under this Indenture (including any calculations related to the Notes));

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(b) the Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer or Officers of the Trustee, unless it shall be proved that the Trustee was grossly negligent in ascertaining the pertinent facts;

(c) the Trustee shall not be liable with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the Holders of not less than a majority of the aggregate principal amount of the Notes at the time outstanding determined as provided in Section 8.04 relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee, under this Indenture;

(d) whether or not therein provided, every provision of this Indenture relating to the conduct or affecting the liability of, or affording protection to, the Trustee shall be subject to the provisions of this Section;

(e) the Trustee shall not be liable in respect of any payment (as to the correctness of amount, entitlement to receive or any other matters relating to payment) or notice effected by the Company or any Paying Agent or any records maintained by any co-Note Registrar with respect to the Notes;

(f) if any party fails to deliver a notice relating to an event the fact of which, pursuant to this Indenture, requires notice to be sent to the Trustee, the Trustee may conclusively rely on its failure to receive such notice as reason to act as if no such event occurred, unless a Responsible Officer of the Trustee had actual knowledge of such event;

(g) in the absence of written investment direction from the Company, all cash received by the Trustee shall be placed in a non-interest bearing trust account, and in no event shall the Trustee be liable for the selection of investments or for investment losses incurred thereon or for losses incurred as a result of the liquidation of any such investment prior to its maturity date or the failure of the party directing such investments prior to its maturity date or the failure of the party directing such investment to provide timely written investment direction, and the Trustee shall have no obligation to invest or reinvest any amounts held hereunder in the absence of such written investment direction from the Company; and

(h) in the event that the Trustee is also acting as Custodian, Note Registrar, Paying Agent, Conversion Agent, Bid Solicitation Agent or transfer agent hereunder, the rights and protections afforded to the Trustee pursuant to this Article 7 shall also be afforded to such Custodian, Note Registrar, Paying Agent, Conversion Agent, Bid Solicitation Agent or transfer agent.

None of the provisions contained in this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur personal financial liability in the performance of any of its duties or in the exercise of any of its rights or powers.

Section 7.02. *Reliance on Documents, Opinions, Etc.* Except as otherwise provided in Section 7.01:

(a) the Trustee may conclusively rely and shall be fully protected in acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, note, coupon or other paper or document believed by it in good faith to be genuine and to have been signed or presented by the proper party or parties;

(b) any request, direction, order or demand of the Company mentioned herein shall be sufficiently evidenced by an Officer's Certificate (unless other evidence in respect thereof be herein specifically prescribed); and any Board Resolution may be evidenced to the Trustee by a copy thereof certified by the Secretary or an Assistant Secretary of the Company;

(c) the Trustee may consult with counsel of its selection and require an Opinion of Counsel and any advice of such counsel or Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or omitted by it hereunder in good faith and in accordance with such advice or Opinion of Counsel;

(d) the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture or other paper or document, but the Trustee, in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit, and, if the Trustee shall determine to make such further inquiry or investigation, it shall be entitled to examine the books, records and premises of the Company, personally or by agent or attorney at the expense of the Company and shall incur no liability of any kind by reason of such inquiry or investigation;

(e) the Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents, custodians, nominees or attorneys and the Trustee shall not be responsible for any misconduct or negligence on the part of any agent, custodian, nominee or attorney appointed by it with due care hereunder; and

(f) the permissive rights of the Trustee enumerated herein shall not be construed as duties.

In no event shall the Trustee be liable for any indirect, special, punitive or consequential loss or damage of any kind whatsoever (including but not limited to lost profits), even if the Trustee has been advised of the likelihood of such loss or damage and regardless of the form of action other than any such loss or damage caused by the Trustee's willful misconduct or gross negligence, as determined in a final and non-appealable decision by a court of competent jurisdiction. The Trustee shall not be charged with knowledge of any Default or Event of Default with respect to the Notes, unless either (1) a Responsible Officer shall have actual knowledge of such Default or Event of Default or (2) written notice of such Default or Event of Default shall have been given to the Trustee by the Company or by any Holder of the Notes.

Section 7.03. No Responsibility for Recitals, Etc. The recitals contained herein and in the Notes (except in the Trustee's certificate of authentication) shall be taken as the statements of the Company, and the Trustee assumes no responsibility for the correctness of the same. The Trustee makes no representations as to the validity or sufficiency of this Indenture or of the

Notes. The Trustee shall not be accountable for the use or application by the Company of any Notes or the proceeds of any Notes authenticated and delivered by the Trustee in conformity with the provisions of this Indenture.

Section 7.04. Trustee, Paying Agents, Conversion Agents, Bid Solicitation Agent or Note Registrar May Own Notes. The Trustee, any Paying Agent, any Conversion Agent, Bid Solicitation Agent (if other than the Company or any Affiliate thereof) or Note Registrar, in its individual or

any other capacity, may become the owner or pledgee of Notes with the same rights it would have if it were not the Trustee, Paying Agent, Conversion Agent, Bid Solicitation Agent or Note Registrar.

Section 7.05. *Monies and Shares of Common Stock to Be Held in Trust.* All monies and shares of Common Stock received by the Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received. Money and shares of Common Stock held by the Trustee in trust hereunder need not be segregated from other funds except to the extent required by law. The Trustee shall be under no liability for interest on any money or shares of Common Stock received by it hereunder except as may be agreed from time to time by the Company and the Trustee.

Section 7.06. *Compensation and Expenses of Trustee.* The Company covenants and agrees to pay to the Trustee from time to time, and the Trustee shall receive reasonable compensation for all services rendered by it hereunder in any capacity (which shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) as mutually agreed to in writing between the Trustee and the Company, and the Company will pay or reimburse the Trustee for all fees, expenses, disbursements and advances reasonably incurred or made by the Trustee in accordance with any of the provisions of this Indenture in any capacity hereunder (including the compensation and the expenses and disbursements of its agents and counsel and of all Persons not regularly in its employ) except any such expense, disbursement or advance as shall have been determined to have been caused by its own gross negligence or willful misconduct, as determined in a final and non-appealable decision by a court of competent jurisdiction. The Company and the Guarantors, jointly and severally, also covenant to indemnify the Trustee in any capacity under this Indenture and any other document or transaction entered into in connection herewith and its agents and any authenticating agent for, and to hold them harmless against, any loss, claim, damage, liability or expense incurred without gross negligence or willful misconduct on the part of the Trustee, its officers, directors, agents or employees, or such agent or authenticating agent, as the case may be, and in each case, as determined in a final and non-appealable decision by a court of competent jurisdiction, and **unsuspected**, arising out of or in connection **any way connected with the acceptance** events, acts, conduct, or administration of this Indenture, including the enforcement of this Section 7.06, or in any other capacity hereunder, including the costs and expenses of defending themselves against any claim of liability in the premises and enforcing the Company's or Guarantors' obligations hereunder. The obligations of the Company and the Guarantors under this Section 7.06 to compensate or indemnify the Trustee and to pay or reimburse the Trustee for expenses, disbursements and advances shall be secured by a senior claim to which the Notes are hereby made subordinate on all money or property held or collected by the Trustee, except, subject to the effect of Section 6.05, funds held in trust herewith for the benefit of the Holders of particular Notes. The Trustee's right to receive payment of any amounts due under this Section

7.06 shall not be subordinate to any other liability or indebtedness of the Company. The obligations of the Company and the Guarantors under this Section 7.06 shall survive the satisfaction and discharge of this Indenture and the earlier resignation or removal of the Trustee. Neither the Company nor any Guarantor need pay for any settlement made without its consent, which consent shall not be unreasonably withheld. The indemnification provided in this Section 7.06 shall extend to the officers, directors, agents and employees of the Trustee.

Without prejudice to any other rights available to the Trustee under applicable law, when the Trustee and its agents and any authenticating agent incur expenses or render services after an Event of Default specified in Section 6.01(h) or Section 6.01(i) occurs, the expenses and the compensation for the services are intended to constitute expenses of administration under any bankruptcy, insolvency or similar laws.

Section 7.07. *Officer's Certificate as Evidence.* Except as otherwise provided in Section 7.01, whenever in the administration of the provisions of this Indenture the Trustee shall deem it necessary or desirable that a matter be proved or established prior to taking or omitting any action hereunder, such matter (unless other evidence in respect thereof be herein specifically prescribed) may, in the absence of gross negligence or willful misconduct on the part of the Trustee (as determined in a final and non-appealable decision by a court of competent jurisdiction), be deemed to be conclusively proved and established by an Officer's Certificate delivered to the Trustee, and such Officer's Certificate, in the absence of gross negligence or willful misconduct on the part of the Trustee (as determined in a final and non-appealable decision by a court of competent jurisdiction), shall be full warrant to the Trustee for any action taken or omitted by it under the provisions of this Indenture upon the faith thereof.

Section 7.08. *Eligibility of Trustee.* There shall at all times be a Trustee hereunder which shall be a Person that is eligible pursuant to the Trust Indenture Act (as if the Trust Indenture Act were applicable hereto) to act as such and has a combined capital and surplus of at least \$50,000,000. If such Person publishes reports of condition at least annually, pursuant to law or to the requirements of any supervising or examining authority, then for the purposes of this Section, the combined capital and surplus of such Person shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. If omissions occurring at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section, it shall resign immediately in the manner and with the effect hereinafter specified in this Article.

Section 7.09. *Resignation or Removal of Trustee.* (a) The Trustee may at any time resign by giving written notice of such resignation to the Company and by delivering notice thereof to the Holders. Upon receiving such notice of resignation, the Company shall promptly appoint a successor trustee by written instrument, in duplicate, executed by order of the Board of Directors, one copy of which instrument shall be delivered to the resigning Trustee and one copy to the successor trustee. If no successor trustee shall have been so appointed and have accepted appointment within 60 days after the giving of such notice of resignation to the Holders, the resigning Trustee may, upon ten Business Days' notice to the Company and the Holders, petition any court of competent jurisdiction for the appointment of a successor trustee, or any Holder who has been a bona fide holder of a Note or Notes for at least six months (or since the date of this Indenture) may, subject to the provisions of Section 6.11, on behalf of himself or herself and all

others similarly situated, petition any such court for the appointment of a successor trustee. Such court may thereupon, after such notice, if any, as it may deem proper and prescribe, appoint a successor trustee.

(b) In case at any time any of the following shall occur:

- (i) the Trustee shall cease to be eligible in accordance with the provisions of Section 7.08 and shall fail to resign after written request therefor by the Company or by any such Holder, or
- (ii) the Trustee shall become incapable of acting, or shall be adjudged a bankrupt or insolvent, or a receiver of the Trustee or of its property shall be appointed, or any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation,

then, in either case, the Company may by a Board Resolution remove the Trustee and appoint a successor trustee by written instrument, in duplicate, executed by order of the Board of Directors, one copy of which instrument shall be delivered to the Trustee so removed and one copy to the successor trustee, or, subject to the provisions of Section 6.11, any Holder who has been a bona fide holder of a Note or Notes for at least six months (or since the date of this Indenture) may, on behalf of himself or herself and all others similarly situated, petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor trustee. Such court may thereupon, after such notice, if any, as it may deem proper and prescribe, remove the Trustee and appoint a successor trustee.

(c) The Holders of a majority in aggregate principal amount of the Notes at the time outstanding, as determined in accordance with Section 8.04, may at any time remove the Trustee and nominate a successor trustee that shall be deemed appointed as successor trustee unless within ten days after notice to the Company of such nomination the Company objects thereto, in which case the Trustee so removed or any Holder, upon the terms and conditions and otherwise as in Section 7.09(a) provided, may petition any court of competent jurisdiction for an appointment of a successor trustee.

(d) Any resignation or removal of the Trustee and appointment of a successor trustee pursuant to any of the provisions of this Section 7.09 shall become effective upon acceptance of appointment by the successor trustee as provided in Section 7.10.

Section 7.10. *Acceptance by Successor Trustee.* Any successor trustee appointed as provided in Section 7.09 shall execute, acknowledge and deliver to the Company and to its predecessor trustee an instrument accepting such appointment hereunder, and thereupon the resignation or removal of the predecessor trustee shall become effective and such successor trustee, without any further act, deed or conveyance, shall become vested with all the rights, powers, duties and obligations of its predecessor hereunder, with like effect as if originally named as Trustee herein; but, nevertheless, on the written request of the Company or of the successor trustee, the trustee ceasing to act shall, upon payment of any amounts then due it pursuant to the provisions of Section 7.06, execute and deliver an instrument transferring to such

successor trustee all the rights and powers of the trustee so ceasing to act. Upon request of any such successor trustee, the Company shall execute any and all instruments in writing for more fully and certainly vesting in and confirming to such successor trustee all such rights and powers. Any trustee ceasing to act shall, nevertheless, retain a senior claim to which the Notes are hereby made subordinate on all money or property held or collected by such trustee as such, except for funds held in trust for the benefit of Holders of particular Notes, to secure any amounts then due it pursuant to the provisions of Section 7.06.

No successor trustee shall accept appointment as provided in this Section 7.10 unless at the time of such acceptance such successor trustee shall be eligible under the provisions of Section 7.08.

Upon acceptance of appointment by a successor trustee as provided in this Section 7.10, each of the Company and the successor trustee, at the written direction and at the expense of the Company shall deliver or cause to be delivered notice of the succession of such trustee hereunder to the Holders. If the Company fails to deliver such notice within ten days after acceptance of appointment by the successor trustee, the successor trustee shall cause such notice to be delivered at the expense of the Company.

Section 7.11. Succession by Merger, Etc. Any corporation or other entity into which the Trustee may be merged or converted or with which it may be consolidated, or any corporation or other entity resulting from any merger, conversion or consolidation to which the Trustee shall be a party, or any corporation or other entity succeeding to all or substantially all of the corporate trust business of the Trustee (including the administration of this Indenture), shall be the successor to the Trustee hereunder without the execution or filing of any paper or any further act on the part of any of the parties hereto; *provided* that in the case of any corporation or other entity succeeding to all or substantially all of the corporate trust business of the Trustee such corporation or other entity shall be eligible under the provisions of Section 7.08.

In case at the time such successor to the Trustee shall succeed to the trusts created by this Indenture, any of the Notes shall have been authenticated but not delivered, any such successor to the Trustee may adopt the certificate of authentication of any predecessor trustee or authenticating agent appointed by such predecessor trustee, and deliver such Notes so authenticated; and in case at that time any of the Notes shall not have been authenticated, any successor to the Trustee or an authenticating agent appointed by such successor trustee may authenticate such Notes either in the name of any predecessor trustee hereunder or in the name of the successor trustee; and in all such cases such certificates shall have the full force which it is anywhere in the Notes or in this Indenture provided that the certificate of the Trustee shall have; *provided, however*, that the right to adopt the certificate of authentication of any predecessor trustee or to authenticate Notes in the name of any predecessor trustee shall apply only to its successor or successors by merger, conversion or consolidation.

Section 7.12. Trustee's Application for Instructions from the Company. Any application by the Trustee for written instructions from the Company (other than with regard to any action proposed to be taken or omitted to be taken by the Trustee that affects the rights of the Holders of the Notes under this Indenture) may, at the option of the Trustee, set forth in writing any action

proposed to be taken or omitted by the Trustee under this Indenture and the date on and/or after which such action shall be taken or such omission shall be effective. The Trustee shall not be liable to the Company for any action taken by, or omission of, the Trustee in accordance with a proposal included in such application on or after the date specified in

such application (which date shall not be less than three Business Days after the date any officer that the Company has indicated to the Trustee should receive such application actually receives such application, unless any such officer shall have consented in writing to any earlier date), unless, prior to taking any such action (or the effective date in the case of any omission), the Trustee shall have received written instructions in accordance with this Indenture in response to such application specifying the action to be taken or omitted.

ARTICLE 8
CONCERNING THE HOLDERS

Section 8.01. Action by Holders. Whenever in this Indenture it is provided that the Holders of a specified percentage of the aggregate principal amount of the Notes may take any action (including the making of any demand or request, the giving of any notice, consent or waiver or the taking of any other action), the fact that at the time of taking any such action, the Holders of such specified percentage have joined therein may be evidenced (a) by any instrument or any number of instruments of similar tenor executed by Holders in person or by agent or proxy appointed in writing, (b) by the record of the Holders voting in favor thereof at any meeting of Holders duly called and held in accordance with the provisions of Article 9, or (c) by a combination of such instrument or instruments and any such record of such a meeting of Holders. Whenever the Company or the Trustee solicits the taking of any action by the Holders of the Notes, the Company or the Trustee may fix, but shall not be required to, in advance of such solicitation, a date as the record date for determining Holders entitled to take such action. The record date if one is selected shall be not more than fifteen days prior to the date of commencement of solicitation of such action.

Section 8.02. Proof of Execution by Holders. Subject to the provisions of Section 7.01, Section 7.02 and Section 9.05, proof of the execution of any instrument by a Holder or its agent or proxy shall be sufficient if made in accordance with such reasonable rules and regulations as may be prescribed by the Trustee or in such manner as shall be satisfactory to the Trustee. The holding of Notes shall be proved by the Note Register or by a certificate of the Note Registrar. The record of any Holders' meeting shall be proved in the manner provided in Section 9.06.

Section 8.03. Who Are Deemed Absolute Owners. The Company, the Trustee, any authenticating agent, any Paying Agent, any Conversion Agent and any Note Registrar may deem the Person in whose name a Note shall be registered upon the Note Register to be, and may treat it as, the absolute owner of such Note (whether or not such Note shall be overdue and notwithstanding any notation of ownership or other writing thereon made by any Person other than the Company or any Note Registrar) for the purpose of receiving payment of or on account of the principal (including any Redemption Price and any Fundamental Change Repurchase Price) of and (subject to Section 2.03) accrued interest that has not been paid or capitalized on such Note, for conversion of such Note and for all other purposes under this Indenture; and

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neither the Company nor the Trustee nor any Paying Agent nor any Conversion Agent nor any Note Registrar shall be affected by any notice to the contrary. The sole registered holder of a Global Note shall be the Depositary or its nominee. All such payments or deliveries so made to any Holder for the time being, or upon its order, shall be valid, and, to the extent of the sums or shares of Common Stock so paid or delivered, effectual to satisfy and discharge the liability for monies payable or shares deliverable upon any such Note. Notwithstanding anything to the contrary in this Indenture or the Notes following an Event of Default, any owner of a beneficial interest in a Global Note may directly enforce against the Company, without the consent, solicitation, proxy, authorization or any other action of the Depositary or any other Person, such holder's right to exchange such beneficial interest for a Physical Note in accordance with the provisions of this Indenture.

Section 8.04. Company-Owned Notes Disregarded. In determining whether the Holders of the requisite aggregate principal amount of Notes have concurred in any direction, consent, waiver or other action under this Indenture, Notes that are owned by the Company, by any Subsidiary thereof or by any Affiliate of the Company or any Subsidiary thereof shall be disregarded and deemed not to be outstanding for the purpose of any such determination; *provided* that for the purposes of determining whether the Trustee shall be protected in conclusively relying on any such direction, consent, waiver or other action, only Notes that a Responsible Officer knows are so owned shall be so disregarded. Notes so owned that have been pledged in good faith may be regarded as outstanding for the purposes of this Section 8.04 if the pledgee shall establish to the satisfaction of the Trustee the pledgee's right to so act with respect to such Notes and that the pledgee is not the Company, a Subsidiary thereof or an Affiliate of the Company or a Subsidiary thereof. In the case of a dispute as to such right, any

decision by the Trustee taken upon the advice of counsel shall be full protection to the Trustee. Upon request of the Trustee, the Company shall furnish to the Trustee promptly an Officer's Certificate listing and identifying all Notes, if any, known by the Company to be owned or held by or for the account of any of the above described Persons; and, subject to Section 7.01, the Trustee shall be entitled to accept such Officer's Certificate as conclusive evidence of the facts therein set forth and of the fact that all Notes not listed therein are outstanding for the purpose of any such determination.

Section 8.05. Revocation of Consents; Future Holders Bound. At any time prior to (but not after) the evidencing to the Trustee, as provided in Section 8.01, of the taking of any action by the Holders of the percentage of the aggregate principal amount of the Notes specified in this Indenture in connection with such action, any Holder of a Note that is shown by the evidence to be included in the Notes the Holders of which have consented to such action may, by filing written notice with the Trustee at its Corporate Trust Office and upon proof of holding as provided in Section 8.02, revoke such action so far as concerns such Note. Except as aforesaid, any such action taken by the Holder of any Note shall be conclusive and binding upon such Holder and upon all future Holders and owners of such Note and of any Notes issued in exchange or substitution therefor or upon registration of transfer thereof, irrespective of whether any notation in regard thereto is made upon such Note or any Note issued in exchange or substitution therefor or upon registration of transfer thereof.

ARTICLE 9
HOLDERS' MEETINGS

Section 9.01. Purpose of Meetings. A meeting of Holders may be called at any time and from time to time pursuant to the provisions of this Article 9 for any of the following purposes:

- (a) to give any notice to the Company or to the Trustee or to give any directions to the Trustee permitted under this Indenture, or to consent to the waiving of any Default or Event of Default hereunder (in each case, as permitted under this Indenture) and its consequences, or to take any other action authorized to be taken by Holders pursuant to any of the provisions of Article 6;
- (b) to remove the Trustee and nominate a successor trustee pursuant to the provisions of Article 7;
- (c) to consent to the execution of an indenture or indentures supplemental hereto pursuant to the provisions of Article 10; or
- (d) to take any other action authorized to be taken by or on behalf of the Holders of any specified aggregate principal amount of the Notes under any other provision of this Indenture or under applicable law.

Section 9.02. Call of Meetings by Trustee. The Trustee may at any time call a meeting of Holders to take any action specified in Section 9.01, to be held at such time and at such place as the Trustee shall determine. Notice of every meeting of the Holders, setting forth the time and the place of such meeting and in general terms the action proposed to be taken at such meeting and the establishment of any record date pursuant to Section 8.01, shall be delivered to Holders of such Notes. Such notice shall also be delivered to the Company. Such notices shall be delivered not less than 20 nor more than 90 days prior to the date fixed for the meeting.

Any meeting of Holders shall be valid without notice if the Holders of all Notes then outstanding are present in person or by proxy or if notice is waived before or after the meeting by the Holders of all Notes then outstanding, and if the Company and the Trustee are either present by duly authorized representatives or have, before or after the meeting, waived notice.

Section 9.03. Call of Meetings by Company or Holders. In case at any time the Company, pursuant to a Board Resolution, or the Holders of at least 10% of the aggregate principal amount of the Notes then outstanding, shall have requested the Trustee to call a meeting of Holders, by written request setting forth in reasonable detail the action proposed to be taken at the meeting, and the Trustee shall not have delivered the notice of such meeting within 20 days after receipt of such request, then the Company or such Holders may determine the time and the place for such meeting and may call such meeting to take any action authorized in Section 9.01, by delivering notice thereof as provided in Section 9.02.

Section 9.04. *Qualifications for Voting.* To be entitled to vote at any meeting of Holders a Person shall (a) be a Holder of one or more Notes on the record date pertaining to such meeting or (b) be a Person appointed by an instrument in writing as proxy by a Holder of one or more

Notes on the record date pertaining to such meeting. The only Persons who shall be entitled to be present or to speak at any meeting of Holders shall be the Persons entitled to vote at such meeting and their counsel and any representatives of the Trustee and its counsel and any representatives of the Company and its counsel.

Section 9.05. *Regulations.* Notwithstanding any other provisions of this Indenture, the Trustee may make such reasonable regulations as it may deem advisable for any meeting of Holders, in regard to proof of the holding of Notes and of the appointment of proxies, and in regard to the appointment and duties of inspectors of votes, the submission and examination of proxies, certificates and other evidence of the right to vote, and such other matters concerning the conduct of the meeting as it shall think fit.

The Trustee shall, by an instrument in writing, appoint a temporary chairman of the meeting, unless the meeting shall have been called by the Company or by Holders as provided in Section 9.03, in which case the Company or the Holders calling the meeting, as the case may be, shall in like manner appoint a temporary chairman. A permanent chairman and a permanent secretary of the meeting shall be elected by vote of the Holders of a majority in aggregate principal amount of the Notes represented at the meeting and entitled to vote at the meeting.

Subject to the provisions of Section 8.04, at any meeting of Holders each Holder or proxyholder shall be entitled to one vote for each \$1.00 principal amount of Notes held or represented by him or her; *provided, however,* that no vote shall be cast or counted at any meeting in respect of any Note challenged as not outstanding and ruled by the chairman of the meeting to be not outstanding. The chairman of the meeting shall have no right to vote other than by virtue of Notes held by it or instruments in writing as aforesaid duly designating it as the proxy to vote on behalf of other Holders. Any meeting of Holders duly called pursuant to the provisions of Section 9.02 or Section 9.03 may be adjourned from time to time by the Holders of a majority of the aggregate principal amount of Notes represented at the meeting, whether or not constituting a quorum, and the meeting may be held as so adjourned without further notice.

Section 9.06. *Voting.* The vote upon any resolution submitted to any meeting of Holders shall be by written ballot on which shall be subscribed the signatures of the Holders or of their representatives by proxy and the outstanding aggregate principal amount of the Notes held or represented by them. The permanent chairman of the meeting shall appoint two inspectors of votes who shall count all votes cast at the meeting for or against any resolution and who shall make and file with the secretary of the meeting their verified written reports in duplicate of all votes cast at the meeting. A record in duplicate of the proceedings of each meeting of Holders shall be prepared by the secretary of the meeting and there shall be attached to said record the original reports of the inspectors of votes on any vote by ballot taken thereat and affidavits by one or more Persons having knowledge of the facts setting forth a copy of the notice of the meeting and showing that said notice was delivered as provided in Section 9.02. The record shall show the aggregate principal amount of the Notes voting in favor of or against any resolution. The record shall be signed and verified by the affidavits of the permanent chairman and secretary of the meeting and one of the duplicates shall be delivered to the Company and the other to the Trustee to be preserved by the Trustee, the latter to have attached thereto the ballots voted at the meeting.

Any record so signed and verified shall be conclusive evidence of the matters therein stated.

Section 9.07. No Delay of Rights by Meeting. Nothing contained in this Article 9 shall be deemed or construed to authorize or permit, by reason of any call of a meeting of Holders or any rights expressly or impliedly conferred hereunder to make such call, any hindrance or delay in the exercise of any right or rights conferred upon or reserved to the Trustee or to the Holders under any of the provisions of this Indenture or of the Notes. Nothing contained in this Article 9 shall be deemed or construed to limit any Holder's actions pursuant to the applicable procedures of the Depository so long as the Notes are Global Notes.

ARTICLE 10
SUPPLEMENTAL INDENTURES

Section 10.01. Supplemental Indentures Without Consent of Holders. Without the consent of any Holder, the Company, the Guarantors and the Trustee, at the Company's expense, may from time to time and at any time enter into an indenture or indentures supplemental hereto for one or more of the following purposes:

- (a) to cure any ambiguity, omission, defect or inconsistency in this Indenture, the Notes or the Note Guarantees;
- (b) to provide for the assumption by a Successor Company of the obligations of the Company or a Guarantor under this Indenture pursuant to Article 11;
- (c) to add one or more guarantees with respect to the Notes;
- (d) to secure the Notes or the Note Guarantees;
- (e) to add to the covenants or Events of Default of the Company for the benefit of the Holders or surrender any right or power conferred upon the Company or the Guarantors under this Indenture, the Notes or the Note Guarantees;
- (f) to make any change that does not adversely affect the rights of any Holder under this Indenture or the Notes, as determined by the Company in good faith;
- (g) to increase the Conversion Rate as provided in this Indenture;
- (h) to provide for the appointment of and acceptance of appointment by a successor trustee pursuant to Section 7.09 or to facilitate the administration of the trusts under this Indenture by more than one trustee;
- (i) to irrevocably elect a Settlement Method or a Specified Dollar Amount or a Minimum Specified Amount, or eliminate the Company's right to elect a Settlement Method; *provided* that no such election or elimination will affect any Settlement Method theretofore

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elected (or deemed to be elected) with respect to any Note pursuant to the provisions in Section 14.02;

- (j) to make PIK Payments (including to issue PIK Notes) or facilitate the same;
- (k) to make provisions with respect to conversion rights of the Holders pursuant to Section 14.07 in accordance with the applicable provisions of this Indenture;
- (l) to comply with the rules of the Depository; or
- (m) to evidence the release of any Guarantor from its Note Guarantee in accordance with this Indenture.

Upon the written request of the Company, the Trustee is hereby authorized to, and shall join with the Company and the Guarantors in the execution of any such supplemental indenture, to make any further appropriate agreements and stipulations that may be therein contained, except that the Trustee shall not be obligated to, but may in its discretion, enter into any supplemental indenture that affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

Any supplemental indenture authorized by the provisions of this Section 10.01 may be executed by the Company, the Guarantors and the Trustee without the consent of the Holders of any of the Notes at the time outstanding, notwithstanding any of the provisions of Section 10.02.

Section 10.02. *Supplemental Indentures with Consent of Holders.* With the consent (evidenced as provided in Article 8) of the Holders of at least a majority of the aggregate principal amount of the Notes then outstanding (determined in accordance with Article 8 and including, without limitation, consents obtained in connection with a repurchase of, or tender or exchange offer for, the Notes), the Company, the Guarantors and the Trustee, at the Company's expense, may from time to time and at any time enter into an indenture or indentures supplemental hereto for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture, the Notes, the Note Guarantees or any supplemental indenture or of modifying in any manner the rights of the Holders; *provided, however,* that, without the consent of each Holder of an outstanding Note affected, no such supplemental indenture shall:

- (a) reduce the principal amount of Notes whose Holders must consent to an amendment;
- (b) reduce the rate of or extend the stated time for payment of interest on any Note;
- (c) reduce the principal of or extend the Maturity Date of any Note;
- (d) make any change that adversely affects the conversion rights of any Notes;
- (e) reduce the Redemption Price or the Fundamental Change Repurchase Price of any Note or amend or modify in any manner adverse to the Holders the Company's obligation to

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make such payments, whether through an amendment or waiver of provisions in the covenants, definitions or otherwise;

- (f) make any Note payable in money, or at a place of payment, other than that stated in the Note;
- (g) change the ranking of the Notes;
- (h) impair the right of any Holder to receive payment of principal and interest on such Holder's Notes on or after the due dates therefor or to institute suit for the enforcement of any payment on or with respect to such Holder's Note;
- (i) make any change in this Article 10 that requires each Holder's consent or in the waiver provisions in Section 6.02 or Section 6.09; or
- (j) release the Note Guarantee of any Guarantor except as provided in this Indenture, or make any changes to such Note Guarantee in a manner materially adverse to the Holders.

Upon the written request of the Company, and upon the delivery to the Trustee of evidence of the consent of the requisite Holders as aforesaid and subject to Section 10.05, the Trustee shall join with the Company and the Guarantors in the execution of such supplemental indenture unless such supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture or otherwise, in which case the Trustee may in its discretion, but shall not be obligated to, enter into such supplemental indenture.

Holders do not need under this Section 10.02 to approve the particular form of any proposed supplemental indenture. It shall be sufficient if such Holders approve the substance thereof. After any such supplemental indenture becomes effective, the Company shall deliver to the Holders a notice briefly describing such supplemental indenture. However, the failure to give such notice to all the Holders, or any defect in the notice, will not impair or affect the validity of the supplemental indenture.

Section 10.03. *Effect of Supplemental Indentures.* Upon the execution of any supplemental indenture pursuant to the provisions of this Article 10, this Indenture shall be and be deemed to be modified and amended in accordance therewith and the respective rights, limitation of rights, obligations, duties and immunities under this Indenture of the Trustee, the Company, the Guarantors and the Holders shall thereafter be determined, exercised and enforced hereunder subject in all respects to such modifications and amendments and all the terms and conditions of any such supplemental indenture shall be and be deemed to be part of the terms and conditions of this Indenture for any and all purposes.

Section 10.04. *Notation on Notes.* Notes authenticated and delivered after the execution of any supplemental indenture pursuant to the provisions of this Article 10 may, at the Company's expense, bear a notation in form approved by the Trustee as to any matter provided for in such supplemental indenture. If the Company or the Trustee shall so determine, new Notes so modified as to conform, in the opinion of the Trustee and the Company, to any modification of this Indenture contained in any such supplemental indenture may, at the Company's expense,

be prepared and executed by the Company, authenticated by the Trustee (or an authenticating agent duly appointed by the Trustee pursuant to Section 17.10) and delivered in exchange for the Notes then outstanding, upon surrender of such Notes then outstanding.

Section 10.05. *Evidence of Compliance of Supplemental Indenture to Be Furnished Trustee.* In addition to the documents required by Section 17.05, the Trustee shall receive an Officer's Certificate and an Opinion of Counsel as conclusive evidence that any supplemental indenture executed hereto complies with the requirements of this Article 10 and is permitted or authorized by this Indenture.

ARTICLE 11

CONSOLIDATION MERGER, SALE, CONVEYANCE AND LEASE

Section 11.01. *Company May Consolidate, Etc. on Certain Terms.* Subject to the provisions of Section 11.03, the Company shall not consolidate with or merge with or into, or sell, convey, transfer or lease in one transaction or a series of transactions all or substantially all of the consolidated properties and assets of the Company and its Subsidiaries, taken as a whole, to another Person (other than any such sale, conveyance, transfer or lease to one or more of the Company's Wholly Owned Domestic Subsidiaries), unless:

(a) the resulting, surviving or transferee Person (the "**Successor Company**"), if not the Company, shall be a corporation organized and existing under the laws of the United States of America, any State thereof or the District of Columbia, and the Successor Company (if not the Company) shall expressly assume, by supplemental indenture all of the obligations of the Company under the Notes and this Indenture; and

(b) immediately after giving effect to such transaction, no Default or Event of Default shall have occurred and be continuing under this Indenture.

For purposes of this Section 11.01, the sale, conveyance, transfer or lease of all or substantially all of the properties and assets of one or more Subsidiaries of the Company to another Person, which properties and assets, if held by the Company instead of such Subsidiaries, would constitute all or substantially all of the properties and assets of the Company on a consolidated basis, shall be deemed to be the sale, conveyance, transfer or lease of all or substantially all of the properties and assets of the Company to another Person.

Section 11.02. *Guarantors May Consolidate, Etc. on Certain Terms.* Subject to the provisions of Section 11.03, each Guarantor (other than a Guarantor whose Note Guarantee has been released or is entitled to be released, in each case in accordance with the terms of the Note Guarantee and this Indenture) shall not consolidate with, merge with or into, or sell, lease or transfer in one transaction or a series of related transactions all or substantially all of the consolidated assets of such Guarantor and its Subsidiaries, taken as a whole, to any Person, unless:

(a) the Successor Company, if not such Guarantor, is organized and existing under the laws of the United States of America, any State thereof or the District of Columbia and, in

each case, such Successor Company (if not such Guarantor) shall expressly assume, by supplemental indenture, executed and delivered to the Trustee, in form satisfactory to the Trustee, all of the obligations of such Guarantor under the Notes, the applicable Note Guarantee and this Indenture; and

- (b) immediately after giving effect to such transaction, no Default or Event of Default shall have occurred and be continuing.

Notwithstanding any provision of this Indenture to the contrary, this Section 11.02 shall not apply to any merger or consolidation of a Guarantor with or into, or any sale, lease or conveyance of assets by a Guarantor to, the Company or any other Guarantor or to any Guarantor upon any termination of the Note Guarantee of such Guarantor in accordance with this Indenture.

Section 11.03. Successor Company to Be Substituted. In case of any such consolidation, merger, sale, conveyance, transfer or lease (other than any such sale, conveyance, transfer or lease to one or more of the Company's Wholly Owned Domestic Subsidiaries) and upon the assumption by the Successor Company, by supplemental indenture, executed and delivered to the Trustee and satisfactory in form to the Trustee, of all of the obligations of the Company or Guarantor, as the case may be, under the Notes, the Note Guarantees and this Indenture, such Successor Company (if not the Company or Guarantor, as the case may be) shall succeed to and, except in the case of such a lease, shall be substituted for the Company or Guarantor, as the case may be, with the same effect as if it had been named herein as the party of the first part, and may thereafter exercise every right and power of, the Company or Guarantor, as the case may be, under this Indenture. In the case of the Company, such Successor Company thereupon may cause to be signed, and may issue either in its own name or in the name of the Company any or all of the Notes issuable hereunder which theretofore shall not have been signed by the Company and delivered to the Trustee; and, upon the order of such Successor Company instead of the Company and subject to all the terms, conditions and limitations in this Indenture prescribed, the Trustee shall authenticate and shall deliver, or cause to be authenticated and delivered, any Notes that previously shall have been signed and delivered by the Officers of the Company to the Trustee for authentication, and any Notes that such Successor Company thereafter shall cause to be signed and delivered to the Trustee for that purpose. All the Notes so issued shall in all respects have the same legal rank and benefit under this Indenture as the Notes theretofore or thereafter issued in accordance with the terms of this Indenture as though all of such Notes had been issued at the date of the execution hereof. In the event of any such consolidation, merger, sale, conveyance or transfer (but not in the case of a lease), upon compliance with this Article 11 the Person named as the "Company" in the first paragraph of this Indenture (or any successor that shall thereafter have become such in the manner prescribed in this Article 11) or the applicable Guarantor (or any successor that shall thereafter have become such in the manner prescribed in this Article 11) may be dissolved, wound up and liquidated at any time thereafter and, except in the case of a lease, such Person shall be released from its liabilities as obligor and maker of the Notes and from its obligations under this Indenture and the Notes (and, in the case of a Guarantor, the applicable Note Guarantee).

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In case of any such consolidation, merger, sale, conveyance, transfer or lease, such changes in phraseology and form (but not in substance) may be made in the Notes thereafter to be issued as may be appropriate.

Section 11.04. Opinion of Counsel to Be Given to Trustee. No such consolidation, merger, sale, conveyance, transfer or lease under this Article 11 shall be effective unless the Trustee shall receive an Officer's Certificate and an Opinion of Counsel as conclusive evidence that any such consolidation, merger, sale, conveyance, transfer or lease and any such assumption and, if a supplemental indenture is required in connection with such transaction, such supplemental indenture, complies with the provisions of this Article 11.

ARTICLE 12

IMMUNITY OF INCORPORATORS, STOCKHOLDERS, OFFICERS AND DIRECTORS

Section 12.01. *Indenture, Notes and Note Guarantees Solely Corporate Obligations.* No recourse for the payment of the principal of or any accrued and unpaid interest on any Note or any Note Guarantee, nor for any claim based thereon or otherwise in respect thereof, and no recourse under or upon any obligation, covenant or agreement of the Company or any Guarantor in this Indenture or in any supplemental indenture or in any Note or any Note Guarantee, nor because of the creation of any indebtedness represented thereby, shall be had against any incorporator, stockholder, employee, agent, Officer or director or Subsidiary, as such, past, present or future, of the Company or any Guarantor or of any of their respective successor Persons, either directly or through the Company, any Guarantor or any of their respective successor Persons, whether by virtue of any constitution, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise; it being expressly understood that all such liability is hereby expressly waived and released as a condition of, and as a consideration for, the execution of this Indenture and the issue of the Notes and the Note Guarantees.

ARTICLE 31
GUARANTEES

Section 13.01. *Guarantees.*

(a) Subject to this Article 13, each of the Guarantors hereby fully unconditionally and irrevocably guarantees, jointly and severally, as primary obligor and not merely as surety, to each Holder of the Notes and to the Trustee the full and punctual payment or delivery when due, whether at maturity, upon conversion, upon Fundamental Change repurchase, by acceleration, by redemption or otherwise, of the principal of and Additional Interest, if any, on the Notes, any amounts due upon conversion, and all other obligations of the Company under this Indenture and the Notes (the "**Obligations**") to the Trustee and to the Holders. Each of the Guarantors further agrees (to the extent permitted by law) that the Obligations may be extended or renewed, in whole or in part, without notice or further assent from it, and that it shall remain bound under this Article 13 notwithstanding any extension or renewal of any Obligation.

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(b) Each of the Guarantors waives presentation to, demand of payment from and protest to the Company of any of the Obligations and also waives notice of protest for nonpayment. Each of the Guarantors waives notice of any default under the Notes or the Obligations. The obligations of each of the Guarantors hereunder shall not be affected by (i) the failure of any Holder to assert any claim or demand or to enforce any right or remedy against the Company or any other person under this Indenture, the Notes or any other agreement or otherwise, (ii) any extension or renewal of any thereof, (iii) any rescission, waiver, amendment or modification of any of the terms or provisions of this Indenture, the Notes or any other agreement, (iv) the release of any security held by any Holder or the Trustee for the Obligations or any of them or (v) any change in the ownership of the Company.

(c) Each of the Guarantors further agrees that its Note Guarantee herein constitutes a guarantee of payment when due (and not a guarantee of collection) and waives any right to require that any resort be had by any Holder to any security held for payment of the Obligations.

(d) The obligations of each of the Guarantors hereunder shall not be subject to any reduction, limitation, impairment or termination for any reason (other than payment of the Obligations in full), including any claim of waiver, release, surrender, alteration or compromise, and shall not be subject to any defense of setoff, counterclaim, recoupment or termination whatsoever or by reason of the invalidity, illegality or unenforceability of the Obligations or otherwise. Without limiting the generality of the foregoing, the obligations of each of the Guarantors herein shall not be discharged or impaired or otherwise affected by the failure of any Holder to assert any claim or demand or to enforce any remedy under this Indenture, the Notes or any other agreement, by any waiver or modification of any thereof, by any default, failure or delay, willful or otherwise, in the performance of the Obligations, or by any other act or thing or omission or delay to do any other act or thing which may or might in any manner or to any extent vary the risk of each of the Guarantors or would otherwise operate as a discharge of the Guarantors as a matter of law or equity.

(e) Each of the Guarantors further agrees that its Note Guarantee herein shall continue to be effective or be reinstated, as the case may be, if at any time payment or delivery, or any part thereof, of amounts due upon conversion or principal of or Additional Interest, if any, on any of the Obligations is rescinded or must otherwise be restored by any Holder upon the bankruptcy or reorganization of the Company or otherwise.

(f) In furtherance of the foregoing and not in limitation of any other right which any Holder has at law or in equity against any of the Guarantors by virtue hereof, upon the failure of the Company to pay or delivery any of the Obligations when and as the same shall become due, whether at maturity, upon conversion, upon redemption, upon

Fundamental Change repurchase, by acceleration or otherwise, each of the Guarantors hereby promises to and shall, upon receipt of written demand by the Trustee, forthwith pay or delivery, or cause to be paid or delivered, as the case may be (i) in cash, to the Holders an amount equal to the sum of (x) the unpaid amount of such Obligations then due and owing and (y) accrued and unpaid Additional Interest, if any, on such Obligations then due and owing (but only to the extent not prohibited by law) and/or (ii) any shares of Common Stock then due and owing.

(g) Each of the Guarantors further agrees that, as between itself, on the one hand, and the Holders, on the other hand, (x) the maturity of the Obligations guaranteed hereby may be accelerated as provided in this Indenture for the purposes of its Note Guarantee herein, notwithstanding any stay, injunction or other prohibition preventing such acceleration in respect of the Obligations guaranteed hereby and (y) in the event of any such declaration of acceleration of such Obligations, such Obligations (whether or not due and payable) shall forthwith become due and payable by such Guarantor for the purposes of its Note Guarantee.

Section 13.02. *No Subrogation.* Notwithstanding any payment or payments made by any Guarantor hereunder, no Guarantor shall be entitled to be subrogated to any of the rights of the Trustee or any Holder against the Company or any collateral security or guarantee or right of offset held by the Trustee or any Holder for the payment of the Obligations. The Guarantors will have the right to seek contribution from any non-paying Guarantor so long as the exercise of such right does not impair the rights of the Holders under the Note Guarantee. If any amount shall be paid to any of the Guarantors on account of such subrogation rights at any time when all of the Obligations shall not have been paid in full, such amount shall be held by such Guarantor in trust for the Trustee and the Holders, segregated from other funds of such Guarantor, and shall, forthwith upon receipt by such Guarantor, be turned over to the Trustee in the exact form received by such Guarantor (duly endorsed by such Guarantor to the Trustee, if required), to be applied against the Obligations.

Section 13.03. *Consideration.* Each of the Guarantors has received, or shall receive, direct or indirect benefits from the making of its Note Guarantee.

Section 13.04. *Limitation on Guarantor Liability.* Each Guarantor, and by its acceptance of Notes, each Holder, hereby confirms that it is the intention of all such parties that the Note Guarantee of such Guarantor not constitute a fraudulent transfer or conveyance for purposes of Bankruptcy Law, the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act or any similar federal or state law to the extent applicable to any Note Guarantee. To effectuate the foregoing intention, the Trustee, the Holders and the Guarantors hereby irrevocably agree that the obligations of each Guarantor shall be limited to the maximum amount as will, after giving effect to such maximum amount and all other contingent and fixed liabilities of such Guarantor that are relevant under such laws and after giving effect to any collections from, rights to receive contribution from or payments made by or on behalf of any other Guarantor in respect of the obligations of such other Guarantor under this Article 13, result in the obligations of such Guarantor under its Note Guarantee not constituting a fraudulent transfer or conveyance or a voidable preference, financial assistance or improper corporate benefit, or violating the corporate purpose of the relevant Guarantor or any applicable capital maintenance or similar laws or regulations affecting the rights of creditors generally under any applicable law or regulation. Each Guarantor that makes a payment under its Note Guarantee shall be entitled upon payment in full of all guaranteed obligations under this Indenture to a contribution from each other Guarantor in an amount equal to such other Guarantor's *pro rata* portion of such payment based on the respective net assets of all the Guarantors at the time of such payment determined in accordance with GAAP. Notwithstanding the foregoing, any Guarantee of any Guarantor organized outside the United States of America may be limited as necessary to (1) comply with applicable law, (2) avoid any general legal limitations such as general statutory limitations,

financial assistance, maintenance of share capital, corporate benefit, "thin capitalization" rules, retention of title claims or similar matters or (3) avoid a conflict with the fiduciary duties of such company's directors, contravention of any legal prohibition or regulatory condition, or the material risk of personal or criminal liability for any officers or directors (collectively referred to as "**Agreed Guarantee Principles**," in each case as reasonably determined by the Company).

Section 13.05. Execution and Delivery.

(a) To evidence its Note Guarantee set forth in Section 13.01 hereof, each Guarantor hereby agrees that either (i) this Indenture (or a supplemental indenture, as the case may be) or (ii) a notation of such Note Guarantee as attached hereto as Exhibit B, in each case with such modifications as the Company reasonably determines are appropriate to comply with the Agreed Guarantee Principles, shall be executed on behalf of such Guarantor by one of its Officers, managers, its trustee, its managing member or its general partner, as the case may be.

(b) Each Guarantor hereby agrees that its Note Guarantee set forth in Section 13.01 shall remain in full force and effect notwithstanding the absence of the endorsement of any notation of such Note Guarantee on the Notes.

(c) If an Officer, manager, trustee, managing member or general partner of a Guarantor whose signature is on this Indenture (or a supplemental indenture, as the case may be) no longer holds that office at the time the Trustee authenticates the Notes, the Note Guarantee shall be valid nevertheless.

(d) The delivery of any Note by the Trustee, after the authentication thereof hereunder, shall constitute due delivery of the Note Guarantee set forth in this Indenture on behalf of the Guarantors.

Section 13.06. Release of Guarantors. A Guarantor will be automatically released from all of its obligations under the Notes, this Indenture and its Note Guarantee, and its Note Guarantee will automatically terminate:

(a) upon satisfaction and discharge of this Indenture pursuant to Section 3.01;

(b) upon the consummation of any sale or other disposition of any portion or all of the Capital Stock of such Guarantor (including by way of merger or consolidation) or other transaction such that after giving effect to such sale, disposition or other transaction such Guarantor is no longer a Domestic Subsidiary of the Company;

(c) to the extent that such Guarantor is not an Immaterial Subsidiary solely due to the operation of clause (a) of the definition of "Immaterial Subsidiary," upon the release of the guarantee referred to in such clause; or

(d) entry into a supplemental indenture pursuant to Section 10.02(j) to confirm and evidence the release, termination, discharge or retaking of any Note Guarantee with respect to the Notes when such release, termination, discharge or re-taking is provided for under the Indenture.

Upon request and at the expense of the Company and upon receipt of an Officer's Certificate, the Trustee shall evidence such release by a supplemental indenture or other instrument which may be executed by the Trustee without the consent of any Holder. The Trustee shall have no liability to any Person for any release, supplemental indenture or instrument to evidence the release of a Guarantor delivered in reliance on such Officer's Certificate.

Section 13.07. Future Guarantors. The Company shall cause any Subsidiary that is not, or that has previously been released as, a Guarantor, and that is not a Non-Guarantor Subsidiary, to become a Guarantor and provide a Note Guarantee of the Obligations. Within 60 days of becoming required to be a Guarantor, such Guarantor shall comply with the requirements to execute and deliver a Note Guarantee to the Trustee under Section 13.05 hereto.

ARTICLE 14
CONVERSION OF NOTES

Section 14.01. *Conversion Privilege.*(a) Subject to and upon compliance with the provisions of this Article 14, each Holder of a Note shall have the right, at such Holder's option, to convert all or any portion (if the portion to be converted is \$1,000 Capitalized Principal Amount or any integral multiple of \$1.00 in excess thereof) of such Note (i) subject to satisfaction of the conditions described in Section 14.01(b), at any time prior to the close of business on the Business Day immediately preceding February 28, 2026 under the circumstances and during the periods set forth in Section 14.01(b) (*provided*, that notwithstanding anything to the contrary in this clause (i), no Holder may so convert all or any portion of any such Note (other than subject to satisfaction of the conditions described in Section 14.01(b)(iii)) prior to the Conversion Trigger Date), and (ii) regardless of the conditions described in Section 14.01(b), on or after February 28, 2026 and prior to the close of business on the second Scheduled Trading Day immediately preceding the Maturity Date, in each case, at an initial conversion rate of an amount of shares of Common Stock equal to the Specified Conversion Rate Amount (subject to adjustment as provided in this Article 14, the **"Conversion Rate"**) per \$1,000 Capitalized Principal Amount of Notes (subject to, and in accordance with, the settlement provisions of Section 14.02, the **"Conversion Obligation"**). Not in limitation of the foregoing but by means of example, if \$11,000,000 in Notes are issued on June 23, 2023 and interest has only by paid thereon using the Capitalization Method, then on July 1, 2024, (x) the Initial Principal Amount of the Notes would be \$11,000,000, (y) the aggregate Capitalization Amount on all Notes for all Interest PIK Dates occurring on or prior to such date would be \$917,939 and (z) the Capitalized Principal Amount of the Notes would be \$11,917,939 and if such entire Capitalized Principal Amount of the Notes were converted on that day, the Holders would be entitled to receive 7,418,683 shares of Common Stock (*i.e.*, the Capitalized Principal Amount *multiplied* by the Specified Conversion Rate Amount *divided* by \$1,000 or in this example, $\$11,917,939 \times (674.4258 \div (\$11,000,000 + \$917,939) \div \$11,000,000) \div \$1,000$).

Notwithstanding anything to the contrary in this Indenture or any Note, the aggregate amount of shares of Common Stock issuable upon a conversion of all Notes shall not exceed 7,418,683 shares of Common Stock (as appropriately adjusted for stock splits, stock

combinations, stock dividends and stock distributions in a manner consistent with the adjustments to the Conversion Rate set forth in Section 14.04).

(b) (i) Prior to the close of business on the Business Day immediately preceding February 28, 2026, a Holder may surrender all or any portion of its Notes for conversion at any time during the five Business Day period immediately after any ten consecutive Trading Day period (the **"Measurement Period"**) in which the Trading Price per \$1,000 principal amount of Notes, as determined following a written request by a Holder of Notes in accordance with this Section 14.01(b)(i), for each Trading Day of the Measurement Period was less than 98% of the product of the Last Reported Sale Price of the Common Stock on such Trading Day and the Conversion Rate on each such Trading Day. The Trading Prices shall be determined by the Bid Solicitation Agent pursuant to this Section 14.01(b)(i) and the definition of Trading Price set forth in this Indenture. The Company shall provide written notice to the Bid Solicitation Agent (if other than the Company) of the three independent nationally recognized securities dealers selected by the Company pursuant to the definition of Trading Price, along with appropriate contact information for each. The Bid Solicitation Agent (if other than the Company) shall have no obligation to determine the Trading Price per \$1,000 principal amount of Notes unless the Company has requested such determination, and the Company shall have no obligation to make such request (or, if the Company is acting as Bid Solicitation Agent, the Company shall have no obligation to determine the Trading Price per \$1,000 principal amount of Notes) unless a Holder of at least \$2,000,000 aggregate principal amount of Notes provides the Company with reasonable evidence that the Trading Price per \$1,000 principal amount of Notes on any Trading Day would be less than 98% of the product of the Last Reported Sale Price of the Common Stock on such Trading Day and the Conversion Rate on such Trading Day, at which time the Company shall instruct the Bid Solicitation Agent (if other than the Company) to determine, or if the Company is acting as Bid Solicitation Agent, the Company shall determine the Trading Price per \$1,000 principal amount of Notes beginning on the next Trading Day and on each successive Trading Day until the Trading Price per \$1,000 principal amount of Notes is greater than or equal to 98% of the product of the Last Reported Sale Price of the Common Stock and the Conversion Rate. If (x) the Company is not acting as Bid Solicitation Agent, and the Company does not instruct the Bid Solicitation Agent to obtain bids, or if the Company so instructs the Bid Solicitation Agent to obtain bids and the Bid Solicitation Agent fails to make such determination, or (y) the Company is acting as Bid Solicitation Agent and the Company fails to make such determination, then, in either case, the Trading Price per \$1,000 principal amount of Notes shall be deemed to be less than 98% of the product of the Last Reported Sale Price of the Common Stock and the Conversion Rate on each Trading Day of such failure. If the Trading Price condition set forth above has been met, the Company shall so notify the Holders, the Trustee and the Conversion

Agent (if other than the Trustee). Any such determination will be conclusive absent manifest error, and the Trustee and the Conversion Agent shall be entitled to conclusively rely on the written notice thereof. If, at any time after the Trading Price condition set forth above has been met, the Trading Price per \$1,000 principal amount of Notes is greater than or equal to 98% of the product of the Last Reported Sale Price of the Common Stock and the Conversion Rate for such date, the Company shall so notify the Holders, the Trustee and the Conversion Agent (if other than the Trustee) in writing, and thereafter neither the Company nor the Bid Solicitation Agent (if other than the Company) shall be required to solicit bids (or determine the

Trading Price of the Notes as set forth in this Indenture) again until a new Holder request is made pursuant to this Section 14.01(b)(i).

(ii) If, prior to the close of business on the Business Day immediately preceding February 28, 2026, the Company elects to:

(A) issue to all or substantially all holders of the Common Stock any rights, options or warrants (other than in connection with a stockholder rights plan) entitling them, for a period of not more than 45 calendar days after the announcement date of such issuance, to subscribe for or purchase shares of the Common Stock at a price per share that is less than the average of the Last Reported Sale Prices of the Common Stock for the 10 consecutive Trading Day period ending on, and including, the Trading Day immediately preceding the date of announcement of such issuance; or

(B) distribute to all or substantially all holders of the Common Stock the Company's assets, securities or rights to purchase securities of the Company (other than in connection with a stockholder rights plan prior to the separation of such rights from the Common Stock), which distribution has a per share value, as reasonably determined by the Company, exceeding 10% of the Last Reported Sale Price of the Common Stock on the Trading Day preceding the date of announcement for such distribution,

then, in either case, the Company shall notify the Holders of the Notes, the Trustee and the Conversion Agent (if other than the Trustee) at least 60 Scheduled Trading Days prior to the Ex-Dividend Date for such issuance or distribution (or, if later in the case of any such separation of rights issued pursuant to a stockholder rights plan, as soon as reasonably practicable after the Company becomes aware that such separation or Trigger Event has occurred or will occur); *provided, however, that if the Company is then otherwise permitted to settle conversions by Physical Settlement (and, for the avoidance of doubt, the Company has not elected another Settlement Method to apply, including pursuant to Section 14.02), then the Company may instead elect to provide such notice at least five (5) Scheduled Trading Days prior to such Ex-Dividend Date. In that event, the Company shall be required to settle all conversions with a Conversion Date occurring on or after the date the Company provides such notice and before such Ex-Dividend Date (or, if earlier, the date the Company announces that such issuance or distribution will not take place) by Physical Settlement, and the Company shall elect the same in such notice. Once the Company has given such notice, a Holder may surrender all or any portion of its Notes for conversion at any time until the earlier of (1) the close of business on the Business Day immediately preceding the Ex-Dividend Date for such issuance or distribution and (2) the Company's announcement that such issuance or distribution will not take place (or in the case of a separation or Trigger Event pursuant to a stockholder rights plan, until the 20th Trading Day following the date of such notice), even if the Notes are not otherwise convertible at such time.*

No Holder of a Note may convert any of its Notes pursuant to this clause (ii) if such Holder otherwise participates in such issuance or distribution, at the same time and upon the same terms

as holders of the Common Stock and solely as a result of holding the Notes, in any of the transactions described above in this clause (ii) without having to convert such Holder's Notes as if such Holder held a number of shares of Common Stock equal to the applicable Conversion Rate as of the record date for such issuance or distribution, multiplied by the principal amount (expressed in thousands) of Notes held by such Holder.

(iii) If (A) a transaction or event that constitutes a Fundamental Change occurs prior to the close of business on the Business Day immediately preceding February 28, 2026, regardless of whether a Holder has the right to require the Company to repurchase the Notes pursuant to Section 15.02, or (B) if the Company is a party to a consolidation, merger, binding share exchange, or transfer or lease of all or substantially all of its assets that occurs prior to the close of business on the Business Day immediately preceding February 28, 2026, in each case pursuant to which the Common Stock would be converted into cash, securities or other assets (other than a merger effected solely to change the Company's jurisdiction of incorporation that does not otherwise constitute a Fundamental Change), then, in each case, all or any portion of a Holder's Notes may be surrendered for conversion at any time from or after the effective date of the transaction or event until 35 Trading Days after the actual effective date of such transaction or event (or, if the Company gives notice of such transaction or event after the effective date of such transaction or event, until 35 Trading Days after the date that the Company gives such notice) or, if such transaction or event also constitutes a Fundamental Change, until the related Fundamental Change Repurchase Date. The Company shall notify Holders, the Trustee and the Conversion Agent (if other than the Trustee) as promptly as practicable following the date the Company publicly announces such transaction or event.

(iv) Prior to the close of business on the Business Day immediately preceding February 28, 2026, a Holder may surrender all or any portion of its Notes for conversion at any time during any calendar quarter commencing after the calendar quarter ending on September 30, 2023 (and only during such calendar quarter), if the Last Reported Sale Price of the Common Stock for at least 20 Trading Days (whether or not consecutive) during the period of 30 consecutive Trading Days ending on, and including, the last Trading Day of the immediately preceding calendar quarter is greater than or equal to 130% of the Conversion Price on each applicable Trading Day.

(v) If the Company calls all of the Notes for redemption pursuant to Article 16 prior to the Maturity Date, then a Holder may surrender all or any portion of its Called Notes for conversion at any time prior to the close of business on the second Scheduled Trading Day prior to the Redemption Date, even if the Called Notes are not otherwise convertible at such time. After that time, the right to convert such Called Notes on account of the Company's delivery of a Redemption Notice shall expire, unless the Company defaults in the payment of the Redemption Price, in which case a Holder of Called Notes may convert all or any portion of its Called Notes until the Redemption Price has been paid or duly provided for.

Section 14.02. Conversion Procedure; Settlement Upon Conversion.

(a) Subject to this Section 14.02 and Section 14.07(a), upon conversion of any Note, the Company shall satisfy its Conversion Obligation by paying or delivering, as the case may be, to the converting Holder, in respect of each \$1,000 Capitalized Principal Amount of Notes being converted, cash ("Cash Settlement"), shares of Common Stock, together with cash, if applicable, in lieu of delivering any fractional share of Common Stock in accordance with subsection (j) of this Section 14.02 ("Physical Settlement") or a combination of cash and shares of Common Stock, together with cash, if applicable, in lieu of delivering any fractional share of Common Stock in accordance with subsection (j) of this Section 14.02 ("Combination Settlement"), at its election, as set forth in this Section 14.02. Notwithstanding the foregoing or anything else in this Indenture or the Notes, the Company shall be required to (and shall otherwise be deemed to) elect Cash Settlement in respect of all Notes submitted for conversion unless and until (i) the Authorized Share Effective Date has occurred and (ii) no stockholder approval contemplated by Nasdaq Rule 5635 is required with respect to the issuance, in the aggregate, of Common Stock in excess of the limitations imposed by such rule (A) pursuant to the Stock Purchase Agreement, if applicable, (B) upon conversion of the notes issued under the April 2023 Indenture (assuming, for these purposes, that the Conversion Rate (as defined in the April 2023 Indenture) is increased by the maximum amount pursuant to which such Conversion Rate may be increased pursuant to Section 14.03 of the April 2023 Indenture), if applicable, and (C) upon conversion of the Notes (including due to any amendment or binding change in the interpretation of the applicable Nasdaq listing standards), or if required, such stockholder approval shall have been obtained in accordance with such rule.

(i) (x) All conversions of Called Notes for which the relevant Conversion Date occurs during the related Redemption Period and (y) all conversions for which the relevant Conversion Date occurs on or after February 28, 2026, shall be settled using the same Settlement Method.

(ii) Except for any such conversions for which the relevant Conversion Date occurs during a Redemption Period and any conversions for which the relevant Conversion Date occurs on or after February 28, 2026, and except to the extent the Company elects Physical Settlement to apply pursuant to Section 14.01(b)(ii) in a notice as described in such Section, the Company shall use the same Settlement Method for all conversions occurring on the same Conversion Date, but the Company shall not have any obligation to use the same Settlement Method with respect to conversions that occur on different Conversion Dates.

(iii) If, in respect of any Conversion Date (or one of the periods described below, as the case may be), the Company elects a Settlement Method, the Company shall deliver a notice (the "**Settlement Notice**") of the Settlement Method so elected in respect of such Conversion Date (or such period, as the case may be) to converting Holders (with a copy to the Trustee and the Conversion Agent (if other than the Trustee)) no later than the close of business on the Trading Day immediately following the relevant Conversion Date (or, in the case of (w) any conversions of Called Notes for which the relevant Conversion Date occurs during the related Redemption Period, in the related Redemption

Notice, (x) any conversions of Notes for which the relevant Conversion Date occurs on or after February 28, 2026, no later than the close of business on the Business Day immediately preceding February 28, 2026, (y) any conversion for which the Company has irrevocably elected Physical Settlement to apply pursuant to Section 14.01(b)(ii) in a notice as described in such Section or (z) any conversion for which the Company has irrevocably elected Combination Settlement, with a certain Specified Dollar Amount or a Minimum Specified Amount per \$1,000 Capitalized Principal Amount of Notes, to apply pursuant to the provisions of this Section 14.02(a)(iii), as described in this Section 14.02(a)(iii). If the Company does not timely elect a Settlement Method prior to the deadline set forth in the immediately preceding sentence, the Company shall no longer have the right to elect Cash Settlement or Physical Settlement for such conversion or during such period and the Company shall be deemed to have elected Combination Settlement in respect of its Conversion Obligation, and the Specified Dollar Amount per \$1,000 Capitalized Principal Amount of Notes shall be equal to \$1,000. Such Settlement Notice shall specify the relevant Settlement Method and in the case of an election of Combination Settlement, the relevant Settlement Notice shall indicate the Specified Dollar Amount per \$1,000 Capitalized Principal Amount of Notes. If the Company delivers a Settlement Notice electing Combination Settlement in respect of its Conversion Obligation but does not timely notify converting Holders of the Specified Dollar Amount per \$1,000 Capitalized Principal Amount of Notes in such Settlement Notice, the Specified Dollar Amount per \$1,000 Capitalized Principal Amount of Notes shall be deemed to be \$1,000. By written notice to the Holders (with a copy to the Trustee and the Conversion Agent (if other than the Trustee)), the Company may, prior to February 28, 2026, at its option, elect to irrevocably fix the Settlement Method to any Settlement Method that the Company is then permitted to elect, including Combination Settlement with a Specified Dollar Amount per \$1,000 Capitalized Principal Amount of Notes of \$1,000 or with an ability to continue to set the Specified Dollar Amount per \$1,000 Capitalized Principal Amount of Notes at or above a specific amount (the "**Minimum Specified Amount**") set forth in such election notice. If the Company irrevocably elects Combination Settlement with an ability to continue to set the Specified Dollar Amount per \$1,000 Capitalized Principal Amount of Notes at or above a specific amount, the Company shall send written notice to Holders converting their Notes, the Trustee and the Conversion Agent of such Specified Dollar Amount no later than the relevant deadline for election of a Settlement Method as described in this Section 14.02(a)(iii), or, if the Company does not timely notify Holders, such Specified Dollar Amount shall be the Minimum Specified Amount set forth in the election notice, unless no Minimum Specified Amount was set forth in the election notice, in which case such Specified Dollar Amount shall be \$1,000 per \$1,000 Capitalized Principal Amount of Notes. The irrevocable election shall apply to all Note conversions on Conversion Dates occurring subsequent to delivery of such notice; *provided* that no such election will affect any Settlement Method theretofore elected (or deemed to be elected) with respect to any Note. For the avoidance of doubt, such an irrevocable election, if made, shall be effective without the need to amend this Indenture or the Notes, including pursuant to Section 10.01(i). However, the Company may nonetheless choose to execute such an amendment at its option. If the Company irrevocably fixes the Settlement Method pursuant to the

provisions in this Section 14.02(a)(iii), and such Settlement Method is not Combination Settlement with a Specified Dollar Amount of \$1,000 per \$1,000 Capitalized Principal Amount of Notes, then, concurrently with providing written notice to Holders of such election, the Company shall either post the fixed Settlement Method on its website or disclose the same in a current report on Form 8-K (or any successor form) that is filed with the Commission.

(iv) The cash, shares of Common Stock or combination of cash and shares of Common Stock in respect of any conversion of Notes (the "**Settlement Amount**") shall be computed as follows (for the avoidance of doubt, with pro-ration for any portion of the Capitalized Principal Amount subject to conversion that is not an integral multiple of \$1,000):

(A) if the Company elects to satisfy its Conversion Obligation in respect of such conversion by Physical Settlement, the Company shall deliver to the converting Holder in respect of each \$1,000 Capitalized Principal Amount of Notes being converted a number of shares of Common Stock equal to the Conversion Rate in effect on the Conversion Date;

(B) if the Company elects to satisfy its Conversion Obligation in respect of such conversion by Cash Settlement, the Company shall pay to the converting Holder in respect of each \$1,000 Capitalized Principal Amount of Notes being converted cash in an amount equal to the sum of the Daily Conversion Values for each of the 25 consecutive Trading Days during the related Observation Period; and

(C) if the Company elects (or is deemed to have elected) to satisfy its Conversion Obligation in respect of such conversion by Combination Settlement, the Company shall pay or deliver, as the case may be, in respect of each \$1,000 Capitalized Principal Amount of Notes being converted, a Settlement Amount equal to the sum of the Daily Settlement Amounts for each of the 25 consecutive Trading Days during the related Observation Period.

(v) The Daily Settlement Amounts (if applicable) and the Daily Conversion Values (if applicable) shall be determined by the Company promptly following the last day of the Observation Period. Promptly after such determination of the Daily Settlement Amounts or the Daily Conversion Values, as the case may be, and the amount of cash payable in lieu of delivering any fractional share of Common Stock, the Company shall notify the Trustee and the Conversion Agent (if other than the Trustee) of the Daily Settlement Amounts or the Daily Conversion Values, as the case may be, and the amount of cash payable in lieu of delivering fractional shares of Common Stock. The Trustee and the Conversion Agent (if other than the Trustee) shall have no responsibility for any such determination.

(b) Subject to Section 14.02(e), before any Holder of a Note shall be entitled to convert a Note as set forth above, such Holder shall (i) in the case of a Global Note, comply with the procedures of the Depository in effect at that time for converting a beneficial interest in a

Global Note and, if required, pay funds equal to interest payable on the next Interest Payment Date to which such Holder is not entitled as set forth in Section 14.02(h) (and, if required, pay all transfer or similar taxes, if any, as set forth in Section 14.02(d) and Section 14.02(e)) and (ii) in the case of a Physical Note (1) complete, manually sign and deliver an irrevocable notice to the Conversion Agent as set forth in the Form of Notice of Conversion (or a facsimile, PDF or other electronic transmission thereof) (a "**Notice of Conversion**") at the office of the Conversion Agent and state in writing therein the principal amount of Notes to be converted and the name or names (with addresses) in which such Holder wishes the certificate or certificates for any shares of Common Stock to be delivered upon settlement of the Conversion Obligation to be registered, (2) surrender such Notes, duly endorsed to the Company or in blank (and accompanied by appropriate endorsement and transfer documents), at the office of the Conversion Agent, (3) if required, furnish appropriate endorsements and transfer documents and (4) if required, pay funds equal to any accrued interest that has not been capitalized and is payable on the next Interest Payment Date to which such Holder is not entitled as set forth in Section 14.02(h). The Trustee (and, if different, the Conversion Agent) shall

notify the Company of any conversion pursuant to this Article 14 on the Conversion Date for such conversion. No Notes may be surrendered for conversion by a Holder thereof if such Holder has also delivered a Fundamental Change Repurchase Notice to the Company in respect of such Notes and has not validly withdrawn such Fundamental Change Repurchase Notice in accordance with Section 15.03.

If more than one Note shall be surrendered for conversion at one time by the same Holder, the Conversion Obligation with respect to such Notes shall be computed on the basis of the aggregate principal amount of the Notes (or specified portions thereof to the extent permitted thereby) so surrendered.

(c) A Note shall be deemed to have been converted immediately prior to the close of business on the date (the "Conversion Date") that the Holder has complied with the requirements set forth in subsection (b) above. Except as set forth in Section 14.07(a), the Company shall pay or deliver, as the case may be, the consideration due in respect of the Conversion Obligation on the second Business Day immediately following the relevant Conversion Date, if the Company elects Physical Settlement, or on the second Business Day immediately following the last Trading Day of the relevant Observation Period, in the case of any other Settlement Method; *provided* that, with respect to any Conversion Date occurring during a Redemption Period or after the Regular Record Date immediately preceding the Maturity Date, the Company will settle any such conversion for which Physical Settlement is applicable on the relevant Redemption Date or the Maturity Date, as applicable. If any shares of Common Stock are due to converting Holders, the Company shall issue or cause to be issued, and deliver to such Holder, or such Holder's nominee or nominees, certificates or a book-entry transfer through the Depositary for the full number of shares of Common Stock to which such Holder shall be entitled in satisfaction of the Company's Conversion Obligation.

(d) In case any Note shall be surrendered for partial conversion, the Company shall execute and the Trustee shall authenticate and deliver to or upon the written order of the Holder of the Note so surrendered a new Note or Notes in authorized denominations in an aggregate principal amount equal to the unconverted portion of the surrendered Note, without payment of any service charge by the converting Holder but, if required by the Company or Trustee, with

payment of a sum sufficient to cover any documentary, stamp or similar issue or transfer tax or similar governmental charge required by law or that may be imposed in connection therewith as a result of the name of the Holder of the new Notes issued upon such conversion being different from the name of the Holder of the old Notes surrendered for such conversion.

(e) If a Holder submits a Note for conversion, the Company shall pay any documentary, stamp or similar issue or transfer tax or other similar governmental charge due on any issuance of any shares of Common Stock upon conversion, unless the tax is due because the Holder requests any such shares to be issued in a name other than the Holder's name, in which case the Holder shall pay that tax. The Conversion Agent or the Company's stock transfer agent, as applicable, may refuse to deliver the certificates representing the shares of Common Stock being issued in a name other than the Holder's name until the Trustee receives a sum sufficient to pay any tax that is due by such Holder in accordance with the immediately preceding sentence.

(f) Except as provided in Section 14.04, no adjustment shall be made for dividends on any shares of Common Stock issued upon the conversion of any Note as provided in this Article 14.

(g) Upon the conversion of an interest in a Global Note, the Trustee, or the Custodian at the direction of the Trustee, shall make a notation on such Global Note as to the reduction in the principal amount represented thereby. The Company shall notify the Trustee in writing of any conversion of Notes effected through any Conversion Agent other than the Trustee.

(h) Upon conversion, a Holder shall not receive any separate cash payment for any accrued interest that has not been paid or capitalized, except as set forth below. The Company's settlement of the full Conversion Obligation shall be deemed to satisfy in full its obligation to pay the Capitalized Principal Amount of the Note and any accrued interest that has not been paid or capitalized, to, but not including, the relevant Conversion Date. As a result, any accrued interest that has not been paid or capitalized to, but not including, the relevant Conversion Date shall be deemed to be paid in full rather than cancelled, extinguished or forfeited. Upon a conversion of Notes into a combination of cash and shares of Common Stock, accrued interest that has not been paid or capitalized will be deemed to be paid first out of the cash paid upon such conversion. Notwithstanding the foregoing, if Notes are converted after the close of business on a Regular Record Date and on or prior to the open of business on the corresponding Interest Payment Date, Holders of such Notes as of the close of business on such Regular Record Date will receive the full amount of interest payable on such Notes in cash at the Cash Interest Rate as if

the Company had elected the Cash Method for all such interest (whether or not the Company actually elected the Cash Method) and the principal of such converted Notes shall not be increased by any Capitalization Amount (regardless of whether the Company elected or is deemed to have elected the Capitalization Method) on the corresponding Interest Payment Date notwithstanding the conversion. Notes surrendered for conversion during the period from the close of business on any Regular Record Date to the open of business on the immediately following Interest Payment Date must be accompanied by funds equal to the amount of interest payable on the Notes so converted (regardless of whether the converting Holder was the Holder of record on the corresponding Regular Record Date); *provided that* no such payment shall be

required (1) for conversions following the Regular Record Date immediately preceding the Maturity Date; (2) if the Company has specified a Fundamental Change Repurchase Date that is after a Regular Record Date and on or prior to the Business Day immediately succeeding the corresponding Interest Payment Date; (3) if the Company has specified a Redemption Date that is after a Regular Record Date occurring after the Interest Payment Date of December 31, 2023 and on or prior to the second Scheduled Trading Day immediately succeeding the corresponding Interest Payment Date; or (4) to the extent of any overdue interest, if any overdue interest exists at the time of conversion with respect to such Note. Therefore, for the avoidance of doubt, all Holders of record on the Regular Record Date immediately preceding the Maturity Date shall receive the full interest payment due on the Maturity Date in cash regardless of whether their Notes have been converted following such Regular Record Date.

(i) The Person in whose name the certificate for any shares of Common Stock delivered upon conversion is registered shall be deemed to be the holder of record of such shares of Common Stock as of the close of business on the relevant Conversion Date (if the Company elects to satisfy the related Conversion Obligation by Physical Settlement) or the last Trading Day of the relevant Observation Period (if the Company elects to satisfy the related Conversion Obligation by Combination Settlement), as the case may be. Upon a conversion of Notes, such Person shall no longer be a Holder of such Notes surrendered for conversion.

(j) The Company shall not issue any fractional share of Common Stock upon conversion of the Notes and shall instead pay cash in lieu of delivering any fractional share of Common Stock issuable upon conversion based on the Daily VWAP on the relevant Conversion Date (in the case of Physical Settlement) or based on the Daily VWAP on the last Trading Day of the relevant Observation Period (in the case of Combination Settlement). For each Note surrendered for conversion, if the Company has elected (or is deemed to have elected) Combination Settlement, the full number of shares that shall be issued upon conversion thereof shall be computed on the basis of the aggregate Daily Settlement Amounts for the relevant Observation Period and any fractional shares remaining after such computation shall be paid in cash.

(k) If a Holder converts more than one Note on a Conversion Date, then the consideration due upon such conversion will (in the case of any Global Note, to the extent permitted by, and practicable under, the applicable procedures of the Depositary) be computed based on the total principal amount of Notes converted on such Conversion Date by that Holder.

Section 14.03. *[Reserved.]*

Section 14.04. *Adjustment of Conversion Rate.* The Conversion Rate shall be adjusted from time to time by the Company if any of the following events occurs, except that the Company shall not make any adjustments to the Conversion Rate if Holders of the Notes participate (other than in the case of (x) a share split or share combination or (y) a tender or exchange offer), at the same time and upon the same terms as holders of the Common Stock and solely as a result of holding the Notes, in any of the transactions described in this Section 14.04, without having to convert their Notes, as if they held a number of shares of Common Stock equal

to the Conversion Rate for each \$1,000 Capitalized Principal Amount of Notes held by such Holder.

(a) If the Company exclusively issues shares of Common Stock to all or substantially all holders of the Common Stock as a dividend or distribution on shares of the Common Stock, or if the Company effects a share split or share combination, the Conversion Rate shall be adjusted based on the following formula:



where,

CR_0 = the Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date of such dividend or distribution, or immediately prior to the open of business on the Effective Date of such share split or share combination, as applicable;

CR' = the Conversion Rate in effect immediately after the open of business on such Ex-Dividend Date or Effective Date;

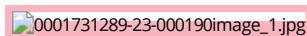
OS_0 = the number of shares of Common Stock outstanding immediately prior to the open of business on such Ex-Dividend Date or Effective Date (before giving effect to any such dividend, distribution, share split or share combination); and

OS' = the number of shares of Common Stock outstanding immediately after giving effect to such dividend, distribution, share split or share combination.

Any adjustment made under this Section 14.04(a) shall become effective immediately after the open of business on the Ex-Dividend Date for such dividend or distribution, or immediately after the open of business on the Effective Date for such share split or share combination, as applicable. If any dividend or distribution of the type described in this Section 14.04(a) is declared but not so paid or made, the Conversion Rate shall be immediately readjusted, effective as of the date the Company determines not to pay such dividend or distribution, to the Conversion Rate that would then be in effect if such dividend or distribution had not been declared.

(b) If the Company issues to all or substantially all holders of Common Stock any rights, options or warrants entitling them, for a period of not more than 45 calendar days after the announcement date of such issuance, to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Last Reported Sale Prices of Common Stock for the 10 consecutive Trading Day period ending on, and including, the Trading Day immediately preceding the date of announcement of such issuance, the Conversion Rate shall be increased based on the following formula:

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where,

CR_0 = the Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date for such issuance;

CR' = the Conversion Rate in effect immediately after the open of business on such Ex-Dividend Date;

OS_0 = the number of shares of Common Stock outstanding immediately prior to the open of business on such Ex-Dividend Date;

X = the total number of shares of Common Stock issuable pursuant to such rights, options or warrants; and

Y = the number of shares of Common Stock equal to the aggregate price payable to exercise such rights, options or warrants, divided by the average of the Last Reported Sale Prices of the Common Stock over the 10 consecutive Trading Day period ending on, and including, the Trading Day immediately preceding the date of announcement of the issuance of such rights, options or warrants.

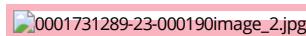
Any increase made under this Section 14.04(b) shall be made successively whenever any such rights, options or warrants are issued and shall become effective immediately after the open of business on the Ex-Dividend Date for such issuance. To the extent that shares of the Common Stock are not delivered after the expiration of such rights, options or warrants, the Conversion Rate shall be decreased to the Conversion Rate that would then be in effect had the increase with respect to the issuance of such rights, options or warrants been made on the basis of delivery of only the number of shares of Common Stock actually delivered. If such rights, options or warrants are not so issued, the Conversion Rate shall be decreased to the Conversion Rate that would then be in effect if such Ex-Dividend Date for such issuance had not occurred.

For purposes of this Section 14.04(b) and Section 14.01(b)(ii)(A), in determining whether any rights, options or warrants entitle the holders of Common Stock to subscribe for or purchase shares of the Common Stock at less than such average of the Last Reported Sale Prices of the Common Stock for the 10 consecutive Trading Day period ending on, and including, the Trading Day immediately preceding the date of announcement of such issuance, and in determining the aggregate offering price of such shares of Common Stock, there shall be taken into account any consideration received by the Company for such rights, options or warrants and any amount payable on exercise or conversion thereof, the value of such consideration, if other than cash, to be determined by the Company.

(c) If the Company distributes shares of its Capital Stock, evidences of its indebtedness, other assets or property of the Company or rights, options or warrants to acquire its Capital Stock or other securities of the Company, to all or substantially all holders of the

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Common Stock, excluding (i) dividends, distributions or issuances as to which an adjustment was effected pursuant to Section 14.04(a) or Section 14.04(b), (ii) dividends or distributions paid exclusively in cash as to which the provisions set forth in Section 14.04(d) shall apply, (iii) distributions of Reference Property issued upon conversion of, or in exchange for, the Common Stock in a transaction described in Section 14.07 and (iv) Spin-Offs as to which the provisions set forth below in this Section 14.04(c) shall apply (any of such shares of Capital Stock, evidences of indebtedness, other assets or property or rights, options or warrants to acquire Capital Stock or other securities, the "Distributed Property"), then the Conversion Rate shall be increased based on the following formula:



where,

CR_0 = the Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date for such distribution;

CR' = the Conversion Rate in effect immediately after the open of business on such Ex-Dividend Date;

SP_0 = the average of the Last Reported Sale Prices of the Common Stock over the 10 consecutive Trading Day period ending on, and including, the Trading Day immediately preceding the Ex-Dividend Date for such distribution; and

FMV = the fair market value (as determined by the Company) of the Distributed Property with respect to each outstanding share of the Common Stock on the Ex-Dividend Date for such distribution.

Any increase made under the portion of this Section 14.04(c) above shall become effective immediately after the open of business on the Ex-Dividend Date for such distribution. If such distribution is not paid or made, the Conversion Rate shall be decreased to the Conversion Rate that would then be in effect if such distribution had not been declared. Notwithstanding the foregoing, if "FMV" (as defined above) is equal to or greater than " SP_0 " (as defined above), in lieu of the foregoing increase, each Holder of a Note shall receive, in respect of each \$1,000 Capitalized Principal Amount thereof, at the same time and upon the same terms as holders of the Common Stock receive the Distributed Property, the amount and kind of Distributed Property such Holder would have received if such Holder owned a number of shares of Common Stock equal to the Conversion Rate in effect on the Ex-Dividend Date for the distribution.

With respect to an adjustment pursuant to this Section 14.04(c) where there has been a payment of a dividend or other distribution on the Common Stock of shares of Capital Stock of any class or series, or similar equity interest, of or relating to any Subsidiary or other business unit of the Company, that are, or, when issued, will be, listed or admitted for trading on a U.S. national securities exchange (a "Spin-Off"), the Conversion Rate shall be increased based on the following formula:

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where,

CR_0 = the Conversion Rate in effect immediately prior to the end of the Valuation Period;

CR' = the Conversion Rate in effect immediately after the end of the Valuation Period;

FMV_0 = the average of the Last Reported Sale Prices of the Capital Stock or similar equity interest distributed to holders of the Common Stock applicable to one share of the Common Stock (determined by reference to the definition of Last Reported Sale Price as set forth in Section 1.01 as if references therein to Common Stock were to such Capital Stock or similar equity interest) over the first 10 consecutive Trading Day period after, and including, the Ex-Dividend Date of the Spin-Off (the "Valuation Period"); and

MP_0 = the average of the Last Reported Sale Prices of the Common Stock over the Valuation Period.

The adjustment to the Conversion Rate under the preceding paragraph shall occur at the close of business on the last Trading Day of the Valuation Period; *provided* that (x) in respect of any conversion of Notes for which Physical Settlement is applicable, if the relevant Conversion Date occurs during the Valuation Period, references to "10" in the portion of this Section 14.04(c) related to Spin-Offs shall be deemed replaced with such lesser number of Trading Days as have elapsed from, and including, the Ex-Dividend Date of such Spin-Off to, and including, the Conversion Date in determining the Conversion Rate and (y) in respect of any conversion of Notes for which Cash Settlement or Combination Settlement is applicable, for any Trading Day that falls within the relevant Observation Period for such conversion and within the Valuation Period, references to "10" in the portion of this Section 14.04(c) related to Spin-Offs shall be deemed replaced with such lesser number of Trading Days as have elapsed from, and including, the Ex-Dividend Date of such Spin-Off to, and including, such Trading Day in determining the Conversion Rate as of such Trading Day. If any dividend or distribution that constitutes a Spin-Off is declared but not so paid or made, the Conversion Rate shall be immediately decreased, effective as of the date the Company determines not to pay or make such dividend or distribution, to the Conversion Rate that would then be in effect if such dividend or distribution had not been declared or announced.

For purposes of this Section 14.04(c) (and subject in all respect to Section 14.11), rights, options or warrants distributed by the Company to all holders of the Common Stock entitling them to subscribe for or purchase shares of the Company's Capital Stock, including Common Stock (either initially or under certain circumstances), which rights, options or warrants, until the occurrence of a specified event or events ("Trigger Event"): (i) are deemed to be transferred with such shares of the Common Stock; (ii) are not exercisable; and (iii) are also issued in respect of future issuances of the Common Stock, shall be deemed not to have been distributed for purposes of this Section 14.04(c) (and no adjustment to the Conversion Rate under this

Section 14.04(c) will be required) until the occurrence of the earliest Trigger Event, whereupon such rights, options or warrants shall be deemed to have been distributed and an appropriate adjustment (if any is required) to the Conversion Rate shall be made under this Section 14.04(c). If any such right, option or warrant, including any such existing rights, options or warrants distributed prior to the date of this Indenture, are subject to events, upon the occurrence of which such rights, options or warrants become exercisable to purchase different securities, evidences of indebtedness or other assets, then the date of the occurrence of any and each such event shall be deemed to be the date of distribution and Ex-Dividend Date with respect to new rights, options or warrants with such rights (in which case the existing rights, options or warrants shall be deemed to terminate and expire on such date without exercise by any of the holders thereof). In addition, in the event of any distribution (or deemed distribution) of rights, options or warrants, or any Trigger Event or other event (of the type described in the immediately preceding sentence) with respect thereto that was counted for purposes of calculating a distribution amount

for which an adjustment to the Conversion Rate under this Section 14.04(c) was made, (1) in the case of any such rights, options or warrants that shall all have been redeemed or purchased without exercise by any holders thereof, upon such final redemption or purchase (x) the Conversion Rate shall be readjusted as if such rights, options or warrants had not been issued and (y) the Conversion Rate shall then again be readjusted to give effect to such distribution, deemed distribution or Trigger Event, as the case may be, as though it were a cash distribution, equal to the per share redemption or purchase price received by a holder or holders of Common Stock with respect to such rights, options or warrants (assuming such holder had retained such rights, options or warrants), made to all holders of Common Stock as of the date of such redemption or purchase, and (2) in the case of such rights, options or warrants that shall have expired or been terminated without exercise by any holders thereof, the Conversion Rate shall be readjusted as if such rights, options and warrants had not been issued.

For purposes of Section 14.04(a), Section 14.04(b) and this Section 14.04(c), if any dividend or distribution to which this Section 14.04(c) is applicable also includes one or both of:

- (A) a dividend or distribution of shares of Common Stock to which Section 14.04(a) is applicable (the "**Clause A Distribution**"); or
- (B) a dividend or distribution of rights, options or warrants to which Section 14.04(b) is applicable (the "**Clause B Distribution**"),

then, in either case, (1) such dividend or distribution, other than the Clause A Distribution and the Clause B Distribution, shall be deemed to be a dividend or distribution to which this Section 14.04(c) is applicable (the "**Clause C Distribution**") and any Conversion Rate adjustment required by this Section 14.04(c) with respect to such Clause C Distribution shall then be made, and (2) the Clause A Distribution and Clause B Distribution shall be deemed to immediately follow the Clause C Distribution and any Conversion Rate adjustment required by Section 14.04(a) and Section 14.04(b) with respect thereto shall then be made, except that, if determined by the Company (I) the "Ex-Dividend Date" of the Clause A Distribution and the Clause B Distribution shall be deemed to be the Ex-Dividend Date of the Clause C Distribution and (II) any shares of Common Stock included in the Clause A Distribution or Clause B Distribution shall be deemed not to be "outstanding immediately prior to the open of business on such Ex-

Dividend Date or Effective Date" within the meaning of Section 14.04(a) or "outstanding immediately prior to the open of business on such Ex-Dividend Date" within the meaning of Section 14.04(b).

(d) If any cash dividend or distribution is made to all or substantially all holders of the Common Stock, the Conversion Rate shall be adjusted based on the following formula:



where,

CR_0 = the Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date for such dividend or distribution;

CR' = the Conversion Rate in effect immediately after the open of business on the Ex-Dividend Date for such dividend or distribution;

SP_0 = the Last Reported Sale Price of the Common Stock on the Trading Day immediately preceding the Ex-Dividend Date for such dividend or distribution; and

C = the amount in cash per share the Company distributes to all or substantially all holders of the Common Stock.

Any increase pursuant to this Section 14.04(d) shall become effective immediately after the open of business on the Ex-Dividend Date for such dividend or distribution. If such dividend or distribution is not so paid, the Conversion Rate shall be decreased, effective as of the date the Company determines not to make or pay such dividend or distribution, to be the Conversion Rate that would then be in effect if such dividend or distribution had not been declared. Notwithstanding the foregoing, if " C " (as defined above) is equal to or greater than " SP_0 " (as defined above), in lieu of the foregoing increase, each Holder of a Note shall receive, for each \$1,000 Capitalized Principal Amount of Notes it holds, at the same time and upon the same terms as holders of shares of the Common Stock, the amount of cash that such Holder would

have received if such Holder owned a number of shares of Common Stock equal to the Conversion Rate in effect on the Ex-Dividend Date for such cash dividend or distribution.

(e) If the Company or any of its Subsidiaries make a payment in respect of a tender or exchange offer for the Common Stock (other than any odd-lot tender offer), to the extent that the cash and value of any other consideration included in the payment per share of the Common Stock exceeds the average of the Last Reported Sale Prices of the Common Stock over the 10 consecutive Trading Day period commencing on, and including, the Trading Day next succeeding the last date on which tenders or exchanges may be made pursuant to such tender or exchange offer, the Conversion Rate shall be increased based on the following formula:



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where,

CR_0 = the Conversion Rate in effect immediately prior to the close of business on the 10th Trading Day immediately following, and including, the Trading Day next succeeding the date such tender or exchange offer expires;

CR' = the Conversion Rate in effect immediately after the close of business on the 10th Trading Day immediately following, and including, the Trading Day next succeeding the date such tender or exchange offer expires;

AC = the aggregate value of all cash and any other consideration (as determined by the Company) paid or payable for shares of Common Stock purchased in such tender or exchange offer;

OS_0 = the number of shares of Common Stock outstanding immediately prior to the date such tender or exchange offer expires (prior to giving effect to the purchase of all shares of Common Stock accepted for purchase or exchange in such tender or exchange offer);

OS' = the number of shares of Common Stock outstanding immediately after the date such tender or exchange offer expires (after giving effect to the purchase of all shares of Common Stock accepted for purchase or exchange in such tender or exchange offer); and

SP' = the average of the Last Reported Sale Prices of the Common Stock over the 10 consecutive Trading Day period commencing on, and including, the Trading Day next succeeding the date such tender or exchange offer expires.

The adjustment to the Conversion Rate under this Section 14.04(e) shall occur at the close of business on the 10th Trading Day immediately following, and including, the Trading Day next succeeding the date such tender or exchange offer expires; provided that (x) in respect of any conversion of Notes for which Physical Settlement is applicable, if the relevant Conversion Date occurs during the 10 Trading Days immediately following, and including, the Trading Day next succeeding the expiration date of any tender or exchange offer, references to "10" or "10th" in this Section 14.04(e) shall be deemed replaced with such lesser number of Trading Days as have elapsed from, and including, the Trading Day next succeeding the expiration date of such tender or exchange offer to, and including, such Conversion Date in determining the Conversion Rate and (y) in respect of any conversion of Notes for which Cash Settlement or Combination Settlement is applicable, for any Trading Day that falls within the relevant Observation Period for such conversion and within the 10 Trading Days immediately following, and including, the Trading Day next succeeding the expiration date of any tender or exchange offer, references to "10" or "10th" in this Section 14.04(e) shall be deemed replaced with such lesser number of Trading Days as have elapsed from, and including, the Trading Day next succeeding the expiration date of such tender or exchange offer to, and including, such Trading Day in determining the Conversion Rate as of such Trading Day.

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If the Company is obligated to purchase shares of Common Stock pursuant to any such tender or exchange offer described in this Section 14.04(e) but is permanently prevented by applicable law from effecting any such purchase or all such purchases are rescinded, the applicable Conversion Rate will be readjusted to be the Conversion Rate that would then be in effect if such tender or exchange offer had not been made or had been made only in respect of the purchases that have been made.

(f) Notwithstanding this Section 14.04 or any other provision of this Indenture or the Notes, if a Conversion Rate adjustment becomes effective on any Ex-Dividend Date, and a Holder that has converted its Notes on or after such Ex-Dividend Date and on or prior to the related Record Date would be deemed to be the record holder of the shares of Common Stock as of the related Conversion Date as described under Section 14.02(i) based on an adjusted Conversion Rate for such Ex-Dividend Date, then, notwithstanding the Conversion Rate adjustment provisions in this Section 14.04, the Conversion Rate adjustment relating to such Ex-Dividend Date shall not be made for such converting Holder. Instead, such Holder shall be treated as if such Holder were the record owner of the shares of Common Stock on an unadjusted basis and participate in the related dividend, distribution or other event giving rise to such adjustment.

(g) Except as stated herein, the Company shall not adjust the Conversion Rate for the issuance of shares of the Common Stock or any securities convertible into or exchangeable for shares of the Common Stock or the right to purchase shares of the Common Stock or such convertible or exchangeable securities.

(h) In addition to those adjustments required by clauses (a), (b), (c), (d) and (e) of this Section 14.04, and subject to the listing standards of any exchange on which any of the Company's securities are then listed, the Company from time to time may increase the Conversion Rate by any amount for a period of at least 20 Business Days if the Company determines that such increase would be in the Company's best interest. In addition, subject to the listing standards of any exchange on which any of the Company's securities are then listed, the Company may (but is not required to) increase the applicable Conversion Rate to avoid or diminish income tax to holders of Common Stock or rights to purchase shares of Common Stock in connection with a dividend or distribution of shares of Common Stock (or rights to acquire shares of Common Stock) or similar event. Whenever the Conversion Rate is increased pursuant to either of the preceding two sentences, the Company shall deliver to the Holder of each Note a notice of the increase at least 15 days prior to the date the increased Conversion Rate takes effect, and such notice shall state the increased Conversion Rate and the period during which it will be in effect.

(i) Notwithstanding anything to the contrary in this Article 14, the Conversion Rate shall not be adjusted:

(i) upon the issuance of any shares of Common Stock pursuant to any present or future plan providing for the reinvestment of dividends or interest payable on the Company's securities and the investment of additional optional amounts in shares of Common Stock under any plan;

(ii) upon the issuance of any shares of Common Stock or options or rights to purchase those shares pursuant to any present or future employee, director or consultant benefit or incentive plan or program of or assumed by the Company or any of the Company's Subsidiaries;

(iii) upon the issuance of any shares of Common Stock pursuant to any option, warrant, right or exercisable, exchangeable or convertible security not described in clause (ii) of this subsection and outstanding as of the date the Notes were first issued

(iv) upon the repurchase of shares of Common Stock pursuant to an open-market share repurchase program or other buy-back transaction (including, without limitation, through any structured or derivative transactions such as accelerated share repurchase transactions or similar forward derivatives) that is not a tender offer or exchange offer of the nature described in Section 14.04(e);

(v) solely for a change in the par value of the Common Stock; or

(vi) for accrued interest that has not been paid or capitalized, if any.

(j) The Company shall not be required to make an adjustment pursuant to clauses (a), (b), (c), (d) or (e) of this Section 14.04 unless such adjustment would result in a change of at least 1% of the then effective Conversion Rate. However, the Company shall carry forward any adjustment that the Company would otherwise have to make and take

that adjustment into account in any subsequent adjustment. Notwithstanding the foregoing, all such carried-forward adjustments shall be made with respect to the Notes (i) where the aggregate of all such carried-forward adjustments equals or exceeds 1% of the Conversion Rate and (ii) regardless of whether the aggregate adjustment is less than 1% of the Conversion Rate, (x) on the Conversion Date for any Notes (in the case of Physical Settlement) and (y) on each Trading Day of any Observation Period with respect to any Notes (in the case of Cash Settlement or Combination Settlement). All calculations and other determinations under this Article 14 shall be made by the Company and shall be made to the nearest one-ten thousandth (1/10,000th) of a share.

(k) Whenever the Conversion Rate is adjusted as herein provided, the Company shall promptly deliver to the Trustee (and the Conversion Agent if not the Trustee) an Officer's Certificate setting forth (i) the adjusted Conversion Rate, (ii) the subsection of this Section 14.04 pursuant to which such adjustment has been made, showing in reasonable detail the facts upon which such adjustment is based and (iii) the date as of which such adjustment is effective (which certificates shall be conclusive evidence of the accuracy of such adjustment absent manifest error). Unless and until a Responsible Officer of the Trustee shall have received such Officer's Certificate, the Trustee shall not be deemed to have knowledge of any adjustment of the Conversion Rate and may assume without inquiry that the last Conversion Rate of which it has knowledge is still in effect. Promptly after delivery of such certificate, the Company shall prepare a notice of such adjustment of the Conversion Rate setting forth the adjusted Conversion Rate and the date on which each adjustment becomes effective and shall deliver such notice of such adjustment of the Conversion Rate to each Holder. Failure to deliver such notice shall not affect the legality or validity of any such adjustment.

(l) For purposes of this Section 14.04, the number of shares of Common Stock at any time outstanding shall not include shares of Common Stock held in the treasury of the Company so long as the Company does not pay any dividend or make any distribution on shares of Common Stock held in the treasury of the Company, but shall include shares of Common Stock issuable in respect of scrip certificates issued in lieu of fractions of shares of Common Stock.

Section 14.05. *Adjustments of Prices.* Whenever any provision of this Indenture requires the Company to calculate the Last Reported Sale Prices, the Daily VWAPs, the Daily Conversion Values or the Daily Settlement Amounts over a span of multiple days (including, without limitation, an Observation Period), the Company shall make appropriate adjustments in good faith and in a commercially reasonable manner to each to account for any adjustment to the Conversion Rate that becomes effective, or any event requiring an adjustment to the Conversion Rate where the Ex-Dividend Date, Effective Date or expiration date of the event occurs, at any time during the period when the Last Reported Sale Prices, the Daily VWAPs, the Daily Conversion Values or the Daily Settlement Amounts are to be calculated.

Section 14.06. *Shares to Be Fully Paid.* After the Authorized Share Effective Date, the Company shall provide, free from preemptive rights, out of its authorized but unissued shares or shares held in treasury sufficient shares of Common Stock to provide for conversion of the Notes from time to time as such Notes are presented for conversion (assuming that at the time of computation of such number of shares, all such Notes would be converted by a single Holder and that Physical Settlement is applicable).

Section 14.07. *Effect of Recapitalizations, Reclassifications and Changes of the Common Stock.*

(a) In the case of:

- (i) any recapitalization, reclassification or change of the Common Stock (other than changes resulting from a subdivision or combination),
- (ii) any consolidation, merger or combination or similar transaction involving the Company,
- (iii) any sale, lease or other transfer to a third party of the consolidated assets of the Company and the Company's Subsidiaries substantially as an entirety or
- (iv) any statutory share exchange,

in each case, as a result of which the Common Stock would be converted into, or exchanged for, stock, other securities, other property or assets (including cash or any combination thereof) (any such event, a "Merger Event"), then, at and after the effective time of such Merger Event, the right to convert each \$1,000 Capitalized Principal Amount of Notes shall be changed into a right to convert such Capitalized Principal Amount of Notes into the kind and amount of shares of stock, other securities or other property or assets (including cash or any combination thereof) that a holder of a number of shares of Common Stock equal to the Conversion Rate immediately prior to such Merger Event would have owned or been entitled to receive (the "Reference")

Property", with each "**unit of Reference Property**" meaning the kind and amount of Reference Property that a holder of one share of Common Stock is entitled to receive) upon such Merger Event and, prior to or at the effective time of such Merger Event, the Company or the successor or acquiring corporation, as the case may be, shall execute with the Trustee a supplemental indenture permitted under Section 10.01(k) providing for such change in the right to convert each \$1,000 Capitalized Principal Amount of Notes; *provided, however,* that at and after the effective time of the Merger Event (A) the Company or the successor or acquiring corporation, as the case may be, shall continue to have the right to determine the form of consideration to be paid or delivered, as the case may be, upon conversion of Notes in accordance with Section 14.02 and (B) (I) any amount payable in cash upon conversion of the Notes in accordance with Section 14.02 shall continue to be payable in cash, (II) any shares of Common Stock that the Company would have been required to deliver upon conversion of the Notes in accordance with Section 14.02 shall instead be deliverable in the amount and type of Reference Property that a holder of that number of shares of Common Stock would have received in such Merger Event and (III) the Daily VWAP shall be calculated based on the value of a unit of Reference Property.

If the Merger Event causes the Common Stock to be converted into, or exchanged for, the right to receive more than a single type of consideration (determined based in part upon any form of stockholder election), then (i) the Reference Property into which the Notes will be convertible shall be deemed to be the weighted average of the types and amounts of consideration actually received by the holders of Common Stock, and (ii) the unit of Reference Property for purposes of the immediately preceding paragraph shall refer to the consideration referred to in clause (i) attributable to one share of Common Stock. If the holders of the Common Stock receive only cash in such Merger Event, then for all conversions for which the relevant Conversion Date occurs after the effective date of such Merger Event (A) the consideration due upon conversion of each \$1,000 Capitalized Principal Amount of Notes shall be solely cash in an amount equal to the Conversion Rate in effect on the Conversion Date, *multiplied by* the price paid per share of Common Stock in such Merger Event and (B) the Company shall satisfy the Conversion Obligation by paying cash to converting Holders on the second Business Day immediately following the relevant Conversion Date. The Company shall notify Holders, the Trustee and the Conversion Agent (if other than the Trustee) of such weighted average as soon as practicable after such determination is made.

Such supplemental indenture described in the second immediately preceding paragraph shall provide for anti-dilution and other adjustments that are as nearly equivalent as practicable to the adjustments provided for in this Article 14. If, in the case of any Merger Event, the Reference Property includes shares of stock, securities or other property or assets of a Person other than the Company or the successor or purchasing corporation (excluding, for the avoidance of doubt, cash paid by such surviving company, successor or purchaser corporation, as the case may be, in such Merger Event), then such supplemental indenture shall also be executed by such other Person and shall contain such additional provisions to protect the interests of the Holders as the Company reasonably considers necessary by reason of the foregoing, including the provisions providing for the purchase rights set forth in Article 15.

(b) When the Company executes a supplemental indenture pursuant to subsection (a) of this Section 14.07, the Company shall promptly deliver to the Trustee an Officer's Certificate

briefly stating the reasons therefor, the kind or amount of cash, securities or property or asset that will comprise a unit of Reference Property after any such Merger Event, any adjustment to be made with respect thereto and that all conditions precedent have been complied with, and shall promptly deliver or cause to be delivered notice thereof to all Holders. The Company shall cause notice of the execution of such supplemental indenture to be delivered to each Holder within 20 days after execution thereof. Failure to deliver such notice shall not affect the legality or validity of such supplemental indenture.

(c) The Company shall not become a party to any Merger Event unless its terms are consistent with this Section 14.07. None of the foregoing provisions shall affect the right of a holder of Notes to convert its Notes into cash, shares of Common Stock or a combination of cash and shares of Common Stock, as applicable, as set forth in Section 14.01 and Section 14.02 prior to the effective date of such Merger Event.

(d) The above provisions of this Section shall similarly apply to successive Merger Events.

Section 14.08. Certain Covenants.(a) The Company covenants that all shares of Common Stock issued upon conversion of Notes will be fully paid and non-assessable by the Company and free from all taxes, liens and charges with respect to the issue thereof.

(b) The Company covenants that, if any shares of Common Stock to be provided for the purpose of conversion of Notes hereunder require registration with or approval of any governmental authority under any federal or state law before such shares of Common Stock may be validly issued upon conversion, the Company will, to the extent then permitted by the rules and interpretations of the Commission, secure such registration or approval, as the case may be.

(c) The Company further covenants that if at any time the Common Stock shall be listed on any national securities exchange or automated quotation system the Company will list and keep listed, so long as the Common Stock shall be so listed on such exchange or automated quotation system, any Common Stock issuable upon conversion of the Notes.

Section 14.09. Responsibility of Trustee. The Trustee and any other Conversion Agent shall not at any time be under any duty or responsibility to any Holder to determine the Conversion Rate (or any adjustment thereto) or whether any facts exist that may require any adjustment (including any increase) of the Conversion Rate, or with respect to the nature or extent or calculation of any such adjustment when made, or with respect to the method employed, or herein or in any supplemental indenture provided to be employed, in making the same. The Trustee and any other Conversion Agent shall not be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock, or of any securities, property or cash that may at any time be issued or delivered upon the conversion of any Note; and the Trustee and any other Conversion Agent make no representations with respect thereto. Neither the Trustee nor any Conversion Agent shall be responsible for any failure of the Company to issue, transfer or deliver any shares of Common Stock or stock certificates or other securities or property or cash upon the surrender of any Note for the purpose of conversion or to comply with any of the duties, responsibilities or covenants of the Company contained in this

Article. Without limiting the generality of the foregoing, neither the Trustee nor any Conversion Agent shall be under any responsibility to determine the correctness of any provisions contained in any supplemental indenture entered into pursuant to Section 14.07 relating either to the kind or amount of shares of stock or securities or property (including cash) receivable by Holders upon the conversion of their Notes after any event referred to in such Section 14.07 or to any adjustment to be made with respect thereto, but, subject to the provisions of Section 7.01, may accept (without any independent investigation) as conclusive evidence of the correctness of any such provisions, and shall be protected in conclusively relying upon, the Officer's Certificate (which the Company shall be obligated to deliver to the Trustee prior to the execution of any such supplemental indenture) with respect thereto. Neither the Trustee nor the Conversion Agent shall be responsible for determining whether any event contemplated by Section 14.01(b) has occurred that makes the Notes eligible for conversion or no longer eligible therefor until the Company has delivered to the Trustee and the Conversion Agent the notices referred to in Section 14.01(b) with respect to the commencement or termination of such conversion rights, on which notices the Trustee and the Conversion Agent may conclusively rely, and the Company agrees to deliver such notices to the Trustee and the Conversion Agent immediately after the occurrence of any such event or at such other times as shall be provided for in Section 14.01(b).

Section 14.10. Notice to Holders Prior to Certain Actions. In case of any:

- (a) action by the Company or one of its Subsidiaries that would require an adjustment in the Conversion Rate pursuant to Section 14.04 or Section 14.11;
- (b) Merger Event; or

(c) voluntary or involuntary dissolution, liquidation or winding-up of the Company or any of its Subsidiaries;

then, in each case (unless notice of such event is otherwise required pursuant to another provision of this Indenture), the Company shall cause to be delivered to the Trustee and the Conversion Agent (if other than the Trustee) and to be delivered to each Holder, as promptly as possible but in any event at least 20 days prior to the applicable date hereinafter specified, a notice stating (i) the date on which a record is to be taken for the purpose of such action by the Company or one of its Subsidiaries or, if a record is not to be taken, the date as of which the holders of Common Stock of record are to be determined for the purposes of such action by the Company or one of its Subsidiaries, or (ii) the date on which such Merger Event, dissolution, liquidation or winding-up is expected to become effective or occur, and the date as of which it is expected that holders of Common Stock of record shall be entitled to exchange their Common Stock for securities or other property deliverable upon such Merger Event, dissolution, liquidation or winding-up. Failure to give such notice, or any defect therein, shall not affect the legality or validity of such action by the Company or one of its Subsidiaries, Merger Event, dissolution, liquidation or winding-up.

Section 14.11. Stockholder Rights Plans. If the Company has a stockholder rights plan in effect upon conversion of the Notes, each share of Common Stock, if any, issued upon such conversion shall be entitled to receive the appropriate number of rights, if any, and the

certificates representing the Common Stock issued upon such conversion shall bear such legends, if any, in each case as may be provided by the terms of any such stockholder rights plan, as the same may be amended from time to time. However, if, prior to any conversion of Notes, the rights have separated from the shares of Common Stock in accordance with the provisions of the applicable stockholder rights plan so that the Holders would not be entitled to receive any rights in respect of Common Stock, if any, issuable upon conversion of the Notes, the Conversion Rate shall be adjusted at the time of separation as if the Company distributed to all or substantially all holders of the Common Stock Distributed Property as provided in Section 14.04(c), subject to readjustment in the event of the expiration, termination or redemption of such rights.

Section 14.12. Exchange In Lieu Of Conversion. (a) When a Holder surrenders its Notes for conversion, the Company may, at its election, direct the Conversion Agent to surrender, on or prior to the Business Day immediately following the relevant Conversion Date, such Notes to one or more financial institutions designated by the Company (each, a **"Designated Institution"**) for exchange in lieu of conversion (an **"Exchange Election"**). In order to accept any Notes surrendered for conversion for exchange in lieu of conversion, the Designated Institution(s) must agree to timely pay or deliver, as the case may be, in exchange for such Notes, cash, shares of Common Stock or a combination of cash and shares of Common Stock, at the Company's election, that would otherwise be due upon conversion as described in Section 14.02 above or such other amount agreed to by the converting Holder and the Designated Institution(s) (the **"Conversion Consideration"**). If the Company makes the election described above, the Company shall, by the close of business on the Business Day following the relevant Conversion Date, notify in writing the Holder surrendering Notes for conversion, the Trustee and the Conversion Agent (if other than the Trustee), that it has made such election, and the Company shall notify the Designated Institution(s) of the relevant deadline for delivery of the Conversion Consideration and the type of Conversion Consideration to be paid and/or delivered (unless the form of Conversion Consideration has been otherwise agreed by the Holder and the Designated Institution(s) as set forth in this Section 14.12). Any Notes exchanged by any Designated Institution will remain outstanding, subject to applicable procedures of the Depositary.

(b) If any Designated Institution agrees to accept any Notes for exchange but does not timely pay and/or deliver, as the case may be, the related Conversion Consideration to the Conversion Agent, or if such Designated Institution does not accept such Notes for exchange, the Company shall, within the time period specified in Section 14.02(c), pay or deliver, as the case may be, the Conversion Consideration in accordance with the provisions of Section 14.02 as if the Company had not made the Exchange Election.

(c) For the avoidance of doubt, in no event will the Company's designation of a Designated Institution pursuant to this Section 14.12 require such Designated Institution to accept any Notes for exchange.

ARTICLE 15
REPURCHASE OF NOTES AT OPTION OF HOLDERS

Section 15.01. *Intentionally Omitted.*

Section 15.02. *Repurchase at Option of Holders Upon a Fundamental Change or Change in Control Transaction.* (a) If a Fundamental Change or Change in Control Transaction occurs at any time prior to the Maturity Date, each Holder shall have the right, at such Holder's option, to require the Company to repurchase for cash all of such Holder's Notes, or any portion of the principal amount thereof properly surrendered and not validly withdrawn pursuant to Section 15.03 that is equal to \$1,000 or any integral multiple of \$1.00 in excess thereof, on the date (the "Fundamental Change Repurchase Date") specified by the Company that is not less than 20 or more than 35 Business Days following the date of the Fundamental Change Company Notice at a repurchase price equal to (i) in the event of a Change in Control Transaction, 130% of the Capitalized Principal Amount of such Notes or otherwise (ii) 100% of the Capitalized Principal Amount of such Notes, in each case, *plus* any accrued interest thereon that has not been paid or capitalized to, but excluding, the Fundamental Change Repurchase Date (the "Fundamental Change Repurchase Price"), unless the Fundamental Change Repurchase Date falls after a Regular Record Date but on or prior to the Interest Payment Date to which such Regular Record Date relates, in which case the Company shall instead pay in cash at the Cash Interest Rate the full amount of accrued interest that has not been paid or capitalized (to, but excluding, such Interest Payment Date) to Holders of record as of such Regular Record Date (notwithstanding any prior election (or deemed election) by the Company to pay such interest pursuant to the Capitalization Method), and the Fundamental Change Repurchase Price shall be equal to (i) in the event of a Change in Control Transaction, 130% of the Capitalized Principal Amount or otherwise (ii) 100% of the Capitalized Principal Amount, in each case of such Notes to be repurchased pursuant to this Article 15. Any Notes so repurchased by the Company shall be paid for in cash. The Fundamental Change Repurchase Date shall be subject to postponement in order to allow the Company to comply with applicable law as a result of changes to such applicable law occurring after the date of this Indenture.

(b) Repurchases of Notes under this Section 15.02 shall be made, at the option of the Holder thereof, upon:

(i) delivery to the Paying Agent by a Holder of a duly completed notice (the "Fundamental Change Repurchase Notice") in the form set forth in Attachment 2 to the Form of Note attached hereto as Exhibit A, if the Notes are Physical Notes, or in compliance with the Depository's procedures for surrendering interests in Global Notes, if the Notes are Global Notes, in each case on or before the close of business on the Business Day immediately preceding the Fundamental Change Repurchase Date; and

(ii) delivery of the Notes, if the Notes are Physical Notes, to the Paying Agent at any time after delivery of the Fundamental Change Repurchase Notice (together with all necessary endorsements for transfer) at the Corporate Trust Office of the Paying Agent, or book-entry transfer of the Notes, if the Notes are Global Notes, in compliance

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with the procedures of the Depository, in each case such delivery being a condition to receipt by the Holder of the Fundamental Change Repurchase Price therefor.

The Fundamental Change Repurchase Notice in respect of any Notes to be repurchased shall state:

- (i) in the case of Physical Notes, the certificate numbers of the Notes to be delivered for repurchase;
- (ii) the portion of the principal amount of Notes to be repurchased, which must be \$1,000 or any integral multiple of \$1.00 in excess thereof; and
- (iii) that the Notes are to be repurchased by the Company pursuant to the applicable provisions of the Notes and this Indenture;

provided, however, that if the Notes are Global Notes, the Fundamental Change Repurchase Notice must comply with appropriate Depositary procedures.

Notwithstanding anything herein to the contrary, any Holder delivering to the Paying Agent the Fundamental Change Repurchase Notice contemplated by this Section 15.02 shall have the right to withdraw, in whole or in part, such Fundamental Change Repurchase Notice at any time prior to the close of business on the Business Day immediately preceding the Fundamental Change Repurchase Date by delivery of a written notice of withdrawal to the Paying Agent in accordance with Section 15.03.

The Paying Agent shall promptly notify the Company of the receipt by it of any Fundamental Change Repurchase Notice or written notice of withdrawal thereof.

*(c) On or before the 20th Business Day after the occurrence of the effective date of a Fundamental Change, the Company shall provide to all Holders, the Trustee, the Conversion Agent (in the case of a Conversion Agent other than the Trustee) and the Paying Agent (in the case of a Paying Agent other than the Trustee) a notice (the “**Fundamental Change Company Notice**”) of the occurrence of the effective date of the Fundamental Change and of the resulting repurchase right at the option of the Holders arising as a result thereof. In the case of Physical Notes, such notice shall be by first class mail or, in the case of Global Notes, such notice shall be delivered in accordance with the applicable procedures of the Depositary. Each Fundamental Change Company Notice shall specify:*

- (i) the events causing the Fundamental Change or Change in Control Transaction, as applicable;*
- (ii) the effective date of the Fundamental Change or Change in Control Transaction, as applicable;*
- (iii) the last date on which a Holder may exercise the repurchase right pursuant to this Article 15;*

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- (iv) the Fundamental Change Repurchase Price;*
- (v) the Fundamental Change Repurchase Date;*
- (vi) the name and address of the Paying Agent and the Conversion Agent, if applicable;*
- (vii) if applicable, the Conversion Rate and any adjustments to the Conversion Rate as a result of such Fundamental Change;*
- (viii) that the Notes with respect to which a Fundamental Change Repurchase Notice has been delivered by a Holder may be converted only if the Holder validly withdraws the Fundamental Change Repurchase Notice in accordance with the terms of this Indenture; and*
- (ix) the procedures that Holders must follow to require the Company to repurchase their Notes.*

No failure of the Company to give the foregoing notices and no defect therein shall limit the Holders’ repurchase rights or affect the validity of the proceedings for the repurchase of the Notes pursuant to this Section 15.02.

*At the Company’s request, the Trustee shall give such notice in the Company’s name and at the Company’s expense; *provided, however, that, in all cases, the text of such Fundamental Change Company Notice shall be prepared by the Company.**

(d) Notwithstanding the foregoing, no Notes may be repurchased by the Company on any date at the option of the Holders upon a Fundamental Change or Change in Control Transaction if the principal amount of the Notes has been accelerated, and such acceleration has not been rescinded, on or prior to such date (except in the case of an acceleration resulting from a Default by the Company in the payment of the Fundamental Change Repurchase Price with respect to such Notes). The Paying Agent will promptly return to the respective Holders thereof any Physical Notes held by it during the acceleration of the Notes (except in the case of an acceleration resulting from a Default by the Company in the payment of the Fundamental Change Repurchase Price with respect to such Notes), or any instructions for book-entry transfer of the Notes in compliance with the procedures of the Depositary shall be deemed to have been cancelled, and, upon such return or cancellation, as the case may be, the Fundamental Change Repurchase Notice with respect thereto shall be deemed to have been withdrawn.

(e) The Company shall not be required to repurchase or make an offer to repurchase Notes upon the occurrence of a Fundamental Change or Change in Control Transaction, as applicable, otherwise required under this Section 15.02 if a third party makes such an offer to purchase Notes in the same manner, at the same time and otherwise

in compliance with the requirements for an offer made by the Company as set forth in this Indenture and such third party purchases all Notes properly surrendered and not validly withdrawn under such offer to purchase.

Section 15.03. Withdrawal of Fundamental Change Repurchase Notice.(a) A Fundamental Change Repurchase Notice may be withdrawn (in whole or in part) by means of a written notice of withdrawal delivered to the Paying Agent in accordance with this Section 15.03 at any time prior to the close of business on the Business Day immediately preceding the relevant Fundamental Change Repurchase Date, specifying:

- (i) the principal amount of the Notes with respect to which such notice of withdrawal is being submitted,
- (ii) if Physical Notes have been issued, the certificate numbers of the Notes in respect of which such notice of withdrawal is being submitted, and
- (iii) the principal amount, if any, of such Note that remains subject to the original Fundamental Change Repurchase Notice, which portion must be in principal amounts of \$1,000 or any integral multiple of \$1.00 in excess thereof,

provided, however, that if the Notes are Global Notes, the notice must comply with appropriate procedures of the Depositary.

Section 15.04. Deposit of Fundamental Change Repurchase Price.(a) The Company will deposit with the Trustee (or other Paying Agent appointed by the Company, or if the Company is acting as its own Paying Agent, set aside, segregate and hold in trust as provided in Section 4.04) on or prior to 10:00 a.m., New York City time, on the Fundamental Change Repurchase Date an amount of money sufficient to repurchase all of the Notes to be repurchased at the appropriate Fundamental Change Repurchase Price. Subject to receipt of funds and/or Notes by the Trustee (or other Paying Agent appointed by the Company), payment for Notes surrendered for repurchase (and not withdrawn prior to the close of business on the Business Day immediately preceding the Fundamental Change Repurchase Date) will be made on the later of (i) the Fundamental Change Repurchase Date (*provided* the Holder has satisfied the conditions in Section 15.02) and (ii) the time of book-entry transfer or the delivery of such Note to the Trustee (or other Paying Agent appointed by the Company) by the Holder thereof in the manner required by Section 15.02 by mailing checks for the amount payable to the Holders of such Notes entitled thereto as they shall appear in the Note Register; *provided, however, that payments to the Depositary shall be made by wire transfer of immediately available funds to the account of the Depositary or its nominee. The Trustee shall, promptly after such payment and upon written demand by the Company, return to the Company any funds in excess of the Fundamental Change Repurchase Price.*

(b) If by 10:00 a.m. New York City time, on the Fundamental Change Repurchase Date, the Trustee (or other Paying Agent appointed by the Company) holds money sufficient to pay the Fundamental Change Repurchase Price of the Notes to be repurchased on the Fundamental Change Repurchase Date, then, with respect to the Notes that have been properly surrendered for repurchase and have not been validly withdrawn, (i) such Notes will cease to be outstanding, (ii) interest will cease to accrue on such Notes (whether or not book-entry transfer of the Notes has been made or the Notes have been delivered to the Trustee (or other Paying Agent

appointed by the Company)) and (iii) all other rights of the Holders of such Notes will terminate (other than the right to receive the Fundamental Change Repurchase Price).

(c) Upon surrender of a Note that is to be repurchased in part pursuant to Section 15.02, the Company shall execute and the Trustee shall authenticate and deliver to the Holder a new Note in an authorized denomination equal in principal amount to the unrepurchased portion of the Note surrendered.

Section 15.05. Covenant to Comply with Applicable Laws Upon Repurchase of Notes. In connection with any repurchase offer pursuant to this Article 15, the Company will, if required:

- (a) comply with the provisions of any tender offer rules under the Exchange Act that may then be applicable;
- (b) file a Schedule TO or any other required schedule under the Exchange Act; and
- (c) otherwise comply in all material respects with all federal and state securities laws in connection with any offer by the Company to repurchase the Notes;

in each case, so as to permit the rights and obligations under this Article 15 to be exercised in the time and in the manner specified in this Article 15. To the extent that the provisions of any securities laws or regulations enacted after the date the Company initially issues the Notes conflict with the provisions of this Indenture relating to the Company's obligations to repurchase the Notes upon a Fundamental Change, the Company shall comply with the applicable securities laws and regulations and shall not be deemed to have breached its obligations under this Article 15 by virtue of such conflict.

ARTICLE 16

OPTIONAL REDEMPTION

Section 16.01. Optional Redemption. The Notes shall not be redeemable by the Company during the period from the first day immediately following the Interest Payment Date of December 31, 2023 to but excluding June 1, 2025. (x) From the date hereof through the Interest Payment Date of December 31, 2023 and (y) on or after June 1, 2025 and prior to the 26th Scheduled Trading Day immediately preceding the Maturity Date, the Company may, at its option, redeem (an "**Optional Redemption**") for cash all (and not less than all) of the Notes at the Redemption Price applicable during such period.

Section 16.02. Notice of Optional Redemption; Selection of Notes. (a) In case the Company exercises its Optional Redemption right to redeem all of the Notes pursuant to Section 16.01, it shall fix a date for redemption (each, a "**Redemption Date**") and it or, at its written request received by the Trustee not less than 5 Business Days prior to the date such Redemption Notice is to be sent (or such shorter period of time as may be acceptable to the Trustee), the Trustee, in the name of and at the expense of the Company, shall deliver or cause to be delivered a written notice of such Optional Redemption (a "**Redemption Notice**") not less than 35 nor

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more than 50 Scheduled Trading Days prior to the Redemption Date, in each case, to each Holder of Notes so to be redeemed as a whole and not in part; *provided, however,* that, if the Company shall give such notice, it shall also give written notice of the Redemption Date to the Trustee, the Conversion Agent (if other than the Trustee) and the Paying Agent (if other than the Trustee). The Redemption Date must be a Business Day.

(b) The Redemption Notice, if delivered in the manner herein provided, shall be conclusively presumed to have been duly given, whether or not the Holder receives such notice. In any case, failure to give such Redemption Notice or any defect in the Redemption Notice to the Holder of any Note designated for redemption as a whole or in part shall not affect the validity of the proceedings for the redemption of any other Note.

- (c) Each Redemption Notice shall specify:
 - (i) the Redemption Date;
 - (ii) the Redemption Price;

- (iii) that on the Redemption Date, the Redemption Price will become due and payable upon each Note to be redeemed, and that interest thereon, if any, shall cease to accrue on and after the Redemption Date;
- (iv) the place or places where such Notes are to be surrendered for payment of the Redemption Price;
- (v) that Holders of Called Notes may surrender their Called Notes for conversion at any time prior to the close of business on the second Scheduled Trading Day immediately preceding the Redemption Date;
- (vi) the procedures a converting Holder must follow to convert its Called Notes and the Settlement Method;
- (vii) the Conversion Rate; and
- (viii) the CUSIP, ISIN or other similar numbers, if any, assigned to such Notes.

A Redemption Notice shall be irrevocable.

Section 16.03. *Payment of Notes Called for Redemption.* (a) If any Redemption Notice has been given in respect of the Notes in accordance with Section 16.02, all of the Notes shall become due and payable on the Redemption Date at the place or places stated in the Redemption Notice and at the applicable Redemption Price. On presentation and surrender of the Notes at the place or places stated in the Redemption Notice, the Notes shall be paid and redeemed by the Company at the applicable Redemption Price.

- (b) (b) Prior to 10:00 a.m. New York City time on the Redemption Date, the Company shall deposit with the Paying Agent or, if the Company or a Subsidiary of the

Company is acting as the Paying Agent, shall segregate and hold in trust as provided in Section 7.05 an amount of cash (in immediately available funds if deposited on the Redemption Date), sufficient to pay the Redemption Price of all of the Notes to be redeemed on such Redemption Date. Subject to receipt of funds by the Paying Agent, payment for the Notes to be redeemed shall be made on the Redemption Date for such Notes. The Paying Agent shall, promptly after such payment and upon written demand by the Company, return to the Company any funds in excess of the Redemption Price.

Section 16.04. *Restrictions on Redemption.* The Company may not redeem any Notes on any date if the principal amount of the Notes has been accelerated in accordance with the terms of this Indenture, and such acceleration has not been rescinded, on or prior to the Redemption Date (except in the case of an acceleration resulting from a Default by the Company in the payment of the Redemption Price with respect to such Notes).

ARTICLE 17 MISCELLANEOUS PROVISIONS

Section 17.01. *Provisions Binding on Company's and Guarantors' Successors.* All the covenants, stipulations, promises and agreements of the Company and each Guarantor contained in this Indenture shall bind its successors and assigns whether so expressed or not.

Section 17.02. *Official Acts by Successor Entity.* Any act or proceeding by any provision of this Indenture authorized or required to be done or performed by any board, committee or Officer of the Company or a Guarantor shall and may be done and performed with like force and effect by the like board, committee or officer of any corporation or other entity that shall at the time be the lawful sole successor of the Company or such Guarantor, as applicable.

Section 17.03. *Addresses for Notices, Etc.* Any notice or demand that by any provision of this Indenture is required or permitted to be given or served by the Trustee or by the Holders on the Company or any Guarantor shall be deemed to have been sufficiently given or made, for all purposes if given or served by being deposited postage prepaid by registered or certified mail in a post office letter box addressed (until another address is delivered by the Company or any Guarantor to the Trustee) to Nikola Corporation, 4141 E Broadway Road, Phoenix, Arizona 85040, Attention: Chief Legal Officer. Any notice, direction, request or demand hereunder to or upon the Trustee shall be deemed to have been sufficiently given or made, for all purposes, if given or served by being deposited postage prepaid by registered or certified mail in

a post office letter box addressed to the Corporate Trust Office or sent electronically in PDF format to an email address specified by the Trustee.

The Trustee and the Company, by notice to the other, may designate additional or different addresses for subsequent notices or communications.

All notices, approvals, consents, requests and any communications hereunder must be in writing (provided that any communication sent to Trustee hereunder must be in the form of a document that is signed manually or by way of a digital signature provided by DocuSign (or such

other digital signature provider as specified in writing to Trustee by an authorized representative of the Company), in English). If a party elects to give the Trustee e-mail or facsimile instructions (or instructions by a similar electronic method) and the Trustee in its discretion elects to act upon such instructions, the Trustee's understanding of such instructions shall be deemed controlling. The Trustee shall not be liable for any losses, costs or expenses arising directly or indirectly from the Trustee's reliance upon and compliance with such instructions notwithstanding such instructions conflict or are inconsistent with a subsequent written instruction. The party providing electronic notices, instructions or directions agrees to assume all risks arising out of the use of using digital signatures and electronic methods to submit communications to Trustee, including without limitation the risk of Trustee acting on unauthorized instructions, and the risk of interception and misuse by third parties. Notwithstanding the foregoing, the Trustee may in any instance and in its sole discretion require that an original document bearing a manual signature be delivered to the Trustee in lieu of, or in addition to, any such electronic communication.

Any notice or communication delivered or to be delivered to a Holder of Physical Notes shall be mailed to it by first class mail, postage prepaid, at its address as it appears on the Note Register and shall be sufficiently given to it if so mailed within the time prescribed. Any notice or communication delivered or to be delivered to a Holder of Global Notes shall be delivered in accordance with the applicable procedures of the Depositary and shall be sufficiently given to it if so delivered within the time prescribed. Notwithstanding any other provision of this Indenture or any Note, where this Indenture or any Note provides for notice of any event (including any Fundamental Change Company Notice) to a Holder of a Global Note (whether by mail or otherwise), such notice shall be sufficiently given if given to the Depositary (or its designee) pursuant to the standing instructions from the Depositary or its designee, including by electronic mail in accordance with the Depositary's applicable procedures.

Failure to mail or deliver a notice or communication to a Holder or any defect in it shall not affect its sufficiency with respect to other Holders. If a notice or communication is mailed or delivered, as the case may be, in the manner provided above, it is duly given, whether or not the addressee receives it.

In case by reason of the suspension of regular mail service or by reason of any other cause it shall be impracticable to give such notice to Holders by mail, then such notification as shall be made with the approval of the Trustee shall constitute a sufficient notification for every purpose hereunder.

Section 17.04. *Governing Law; Jurisdiction.* THIS INDENTURE, THE NOTE GUARANTEES AND EACH NOTE, AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS INDENTURE AND EACH NOTE, SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK (WITHOUT REGARD TO THE CONFLICTS OF LAWS PROVISIONS THEREOF).

The Company and each Guarantor irrevocably consents and agrees, for the benefit of the Holders from time to time of the Notes and the Trustee, that any legal action, suit or proceeding

against it with respect to obligations, liabilities or any other matter arising out of or in connection with this Indenture, the Note Guarantees or the Notes may be brought in the courts of the State of New York or the courts of the United States located in the Borough of Manhattan, New York City, New York and, until amounts due and to become due in respect of the Notes have been paid, hereby irrevocably consents and submits to the non-exclusive jurisdiction of each such court *in personam*, generally and unconditionally with respect to any action, suit or proceeding for itself in respect of its properties, assets and revenues.

The Company and each Guarantor irrevocably and unconditionally waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of venue of any of the aforesaid actions, suits or proceedings arising out of or in connection with this Indenture brought in the courts of the State of New York or the courts of the United States located in the Borough of Manhattan, New York City, New York and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

Section 17.05. Evidence of Compliance with Conditions Precedent; Certificates and Opinions of Counsel to Trustee. Upon any application or demand by the Company to the Trustee to take any action under any of the provisions of this Indenture, the Company shall furnish to the Trustee an Officer's Certificate and an Opinion of Counsel stating that such action is permitted by the terms of this Indenture and that all conditions precedent have been satisfied; *provided* that no Opinion of Counsel shall be required to be delivered in connection with (w) the initial authentication of Notes upon the original issuance thereof under this Indenture, (x) the authentication of an unrestricted Global Note in the name of the Custodian not containing restrictive legends pursuant to Section 2.05(c), (y) the exchange of the restricted CUSIP of the Restricted Securities to an unrestricted CUSIP pursuant to the applicable procedures of the Depositary upon the Notes or the shares of Common Stock delivered upon conversion thereof becoming freely tradable by non-Affiliates of the Company under Rule 144, or (z) a request by the Company that the Trustee deliver a notice to Holders under the Indenture where the Trustee receives an Officer's Certificate with respect to such notice. With respect to matters of fact, an Opinion of Counsel may rely on an Officer's Certificate or certificates of public officials.

Each Officer's Certificate and Opinion of Counsel provided for, by or on behalf of the Company in this Indenture and delivered to the Trustee with respect to compliance with this Indenture (other than the Officer's Certificates provided for in Section 4.08) shall include (a) a statement that the person signing such certificate is familiar with the requested action and this Indenture; (b) a brief statement as to the nature and scope of the examination or investigation upon which the statement contained in such certificate is based; (c) a statement that, in the judgment of such person, he or she has made such examination or investigation as is necessary to enable him or her to express an informed judgment as to whether or not such action is permitted by this Indenture; and (d) a statement as to whether or not, in the judgment of such person, such action is permitted by this Indenture and that all conditions precedent have been satisfied.

Section 17.06. Legal Holidays. In any case where any Interest Payment Date, any Redemption Date, any Fundamental Change Repurchase Date or the Maturity Date is not a Business Day, then any action to be taken on such date need not be taken on such date, but may

be taken on the next succeeding Business Day with the same force and effect as if taken on such date, and no interest shall accrue in respect of the delay.

Section 17.07. No Security Interest Created. Nothing in this Indenture or in the Notes, expressed or implied, shall be construed to constitute a security interest under the Uniform Commercial Code or similar legislation, as now or hereafter enacted and in effect, in any jurisdiction.

Section 17.08. Benefits of Indenture. Nothing in this Indenture or in the Notes, expressed or implied, shall give to any Person, other than the Holders, the parties hereto, any Paying Agent, any Conversion Agent, any authenticating agent, any Note Registrar and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under this Indenture.

Section 17.09. Table of Contents, Headings, Etc. The table of contents and the titles and headings of the articles and sections of this Indenture have been inserted for convenience of reference only, are not to be considered a part hereof, and shall in no way modify or restrict any of the terms or provisions hereof.

Section 17.10. *Authenticating Agent.* The Trustee may appoint an authenticating agent that shall be authorized to act on its behalf and subject to its direction in the authentication and delivery of Notes in connection with the original issuance thereof and transfers and exchanges of Notes hereunder, including under Section 2.04, Section 2.05, Section 2.06, Section 2.07, Section 10.04 and Section 15.04 as fully to all intents and purposes as though the authenticating agent had been expressly authorized by this Indenture and those Sections to authenticate and deliver Notes. For all purposes of this Indenture, the authentication and delivery of Notes by the authenticating agent shall be deemed to be authentication and delivery of such Notes "by the Trustee" and a certificate of authentication executed on behalf of the Trustee by an authenticating agent shall be deemed to satisfy any requirement hereunder or in the Notes for the Trustee's certificate of authentication. Such authenticating agent shall at all times be a Person eligible to serve as trustee hereunder pursuant to Section 7.08.

Any corporation or other entity into which any authenticating agent may be merged or converted or with which it may be consolidated, or any corporation or other entity resulting from any merger, consolidation or conversion to which any authenticating agent shall be a party, or any corporation or other entity succeeding to the corporate trust business of any authenticating agent, shall be the successor of the authenticating agent hereunder, if such successor corporation or other entity is otherwise eligible under this Section 17.10, without the execution or filing of any paper or any further act on the part of the parties hereto or the authenticating agent or such successor corporation or other entity.

Any authenticating agent may at any time resign by giving written notice of resignation to the Trustee and to the Company. The Trustee may at any time terminate the agency of any authenticating agent by giving written notice of termination to such authenticating agent and to the Company. Upon receiving such a notice of resignation or upon such a termination, or in case at any time any authenticating agent shall cease to be eligible under this Section, the Trustee may

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appoint a successor authenticating agent (which may be the Trustee), shall give written notice of such appointment to the Company and shall deliver notice of such appointment to all Holders.

The Company agrees to pay to the authenticating agent from time to time the agreed-upon compensation for its services.

The provisions of Section 7.02, Section 7.03, Section 7.04, Section 8.03 and this Section 17.10 shall be applicable to any authenticating agent.

If an authenticating agent is appointed pursuant to this Section 17.10, the Notes may have endorsed thereon, in addition to the Trustee's certificate of authentication, an alternative certificate of authentication in the following form:

as Authenticating Agent, certifies that this is one of the Notes described
in the within-named Indenture.

By: _____
Authorized Officer

Section 17.11. *Execution in Counterparts.* This Indenture may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute but one and the same instrument. The exchange of copies of this Indenture and of signature pages by facsimile, PDF or other electronic transmission shall constitute effective execution and delivery of this Indenture as to the parties hereto and may be used in lieu of the original Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile, PDF or such other electronic means shall be deemed to be their original signatures for all purposes. Unless otherwise provided in this Indenture or in any Note, the words "execute," "execution," "signed" and "signature" and words of similar import used in or related to any document to be signed in connection with this Indenture, any Note or any of the transactions contemplated hereby (including amendments, waivers, consents and other modifications) shall be deemed to include electronic signatures and the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature in ink or the use of a paper-based recordkeeping system, as applicable, to the fullest extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act and any other similar state laws based on the Uniform Electronic Transactions Act; *provided* that, notwithstanding anything herein to the contrary, the Trustee is not under

any obligation to agree to accept electronic signatures in any form or in any format unless expressly agreed to by the Trustee pursuant to procedures approved by the Trustee.

Section 17.12. Severability. In the event any provision of this Indenture or in the Notes shall be invalid, illegal or unenforceable, then (to the extent permitted by law) the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired.

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Section 17.13. Waiver of Jury Trial. **EACH OF THE COMPANY, EACH GUARANTOR AND THE TRUSTEE HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE NOTES, THE GUARANTEES OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

Section 17.14. Force Majeure. In no event shall the Trustee be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, pandemics, epidemics, recognized public emergencies, quarantine restrictions, nuclear or natural catastrophes or acts of God, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services, and hacking, cyber-attacks, or other use or infiltration of the Trustee's technological infrastructure exceeding authorized access; it being understood that the Trustee shall use reasonable efforts that are consistent with accepted practices in the banking industry to resume performance as soon as practicable under the circumstances.

Section 17.15. Calculations. Except as otherwise provided herein, the Company shall be responsible for making all calculations called for under the Notes. These calculations include, but are not limited to, determinations of the Last Reported Sale Prices of the Common Stock, the Daily VWAPs, the Daily Conversion Values, the Daily Settlement Amounts, accrued interest payable on the Notes and the Conversion Rate of the Notes. The Company shall make all these calculations in good faith and, absent manifest error, the Company's calculations shall be final and binding on Holders of Notes. The Company shall provide a schedule of its calculations to each of the Trustee and the Conversion Agent, and each of the Trustee and Conversion Agent is entitled to rely conclusively upon the accuracy of the Company's calculations without independent verification. The Trustee will forward the Company's calculations to any Holder of Notes upon the request of that Holder at the sole cost and expense of the Company.

Section 17.16. USA PATRIOT Act. The parties hereto acknowledge that in accordance with Section 326 of the USA PATRIOT Act, the Trustee, like all financial institutions and in order to help fight the funding of terrorism and money laundering, is required to obtain, verify, and record information that identifies each person or legal entity that establishes a relationship or opens an account with the Trustee. The parties to this Indenture agree that they will provide the Trustee with such information as it may request in order for the Trustee to satisfy the requirements of the USA PATRIOT Act.

Section 17.17. No Personal Liability of Directors, Officers, Employees or Stockholders. None of the Company's past, present or future directors, officers, employees or stockholders, as such, shall have any liability for any of the Company's obligations under the Notes or this Indenture or for any claim based on, or in respect or by reason of, such obligations or their creation. By accepting a Note, each Holder waives and releases all such liability. This waiver and release is part of the consideration for the Notes.

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[Remainder of page intentionally left blank]

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IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed as of the date first written above.

NIKOLA CORPORATION

By: /s/ Anastasiya Pasterick
Name: Anastasiya Pasterick
Title: Chief Financial Officer

NIKOLA SUBSIDIARY CORPORATION,
as Guarantor

By: /s/ Anastasiya Pasterick
Name: Anastasiya Pasterick
Title: Chief Financial Officer

[Signature Page to Indenture]

IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed as of the date first written above.

U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION, as Trustee

By: /s/ Brandon Bonfig
Name: Brandon Bonfig
Title: Vice President

[FORM OF FACE OF NOTE]

[INCLUDE FOLLOWING LEGEND IF A GLOBAL NOTE]

[UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION ("DTC"), TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE, OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT HEREUNDER IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE, OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.]

[INCLUDE FOLLOWING LEGEND IF A RESTRICTED SECURITY]

[THIS SECURITY AND THE COMMON STOCK, IF ANY, ISSUABLE UPON CONVERSION OF THIS SECURITY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "**SECURITIES ACT**"), AND MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT IN ACCORDANCE WITH THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF OR OF A BENEFICIAL INTEREST HEREIN, THE ACQUIRER:

(1) REPRESENTS THAT IT AND ANY ACCOUNT FOR WHICH IT IS ACTING IS A "QUALIFIED INSTITUTIONAL BUYER" (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT, AND

(2) AGREES FOR THE BENEFIT OF NIKOLA CORPORATION. (THE "**COMPANY**") THAT IT WILL NOT OFFER, SELL, PLEDGE OR OTHERWISE TRANSFER THIS SECURITY OR ANY BENEFICIAL INTEREST HEREIN EXCEPT:

(A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF,

(B) PURSUANT TO A REGISTRATION STATEMENT WHICH HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT,

(C) TO A QUALIFIED INSTITUTIONAL BUYER IN COMPLIANCE WITH RULE 144A UNDER THE SECURITIES ACT, OR

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(D) PURSUANT TO AN EXEMPTION FROM REGISTRATION PROVIDED BY RULE 144 UNDER THE SECURITIES ACT OR ANY OTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

PRIOR TO THE REGISTRATION OF ANY TRANSFER IN ACCORDANCE WITH CLAUSE (2)(D) ABOVE, THE COMPANY AND THE TRUSTEE RESERVE THE RIGHT TO REQUIRE THE DELIVERY OF SUCH LEGAL OPINIONS, CERTIFICATIONS OR OTHER EVIDENCE AS MAY REASONABLY BE REQUIRED IN ORDER TO DETERMINE THAT THE PROPOSED TRANSFER IS

BEING MADE IN COMPLIANCE WITH THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS. NO REPRESENTATION IS MADE AS TO THE AVAILABILITY OF ANY EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.]

[INCLUDE FOLLOWING LEGEND FOR ALL NOTES]

[THIS NOTE HAS BEEN ISSUED WITH ORIGINAL ISSUE DISCOUNT ("OID") FOR UNITED STATES FEDERAL INCOME TAX PURPOSES. UPON REQUEST, THE ISSUER WILL PROMPTLY MAKE AVAILABLE TO A HOLDER OF THIS NOTE INFORMATION REGARDING THE ISSUE PRICE, AMOUNT OF OID, ISSUE DATE AND YIELD TO MATURITY OF THE NOTES BY SUBMITTING A WRITTEN REQUEST FOR SUCH INFORMATION TO THE ISSUER AT NIKOLA CORPORATION, 4141 E BROADWAY ROAD, PHOENIX, ARIZONA 85040, ATTENTION: CHIEF LEGAL OFFICER, OR VIA EMAIL AT .]

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Nikola Corporation

8.00% / 8.00% Series C Convertible Senior PIK Toggle Note due 2026

No. [] [Initially]¹ \$[]

[CUSIP No. [654110AE5]]²

Nikola Corporation, a corporation duly organized and validly existing under the laws of the State of Delaware (the "Company," which term includes any successor corporation or other entity under the Indenture referred to on the reverse hereof), for value received hereby promises to pay to [CEDE & CO.]³ []⁴, or registered assigns, the principal sum [as set forth in the "Schedule of Exchanges of Notes" attached hereto]⁵ [of \$[]]⁶, in accordance with the rules and procedures of the Depository, on May 31, 2026, and interest thereon as set forth below.

This Note shall bear interest at the applicable Cash Interest Rate or PIK Interest Rate from June 23, 2023, or from and including the most recent date to which interest has been paid or provided for to, but excluding, the next scheduled Interest Payment Date until May 31, 2026. Accrued interest on this Note shall be computed on the basis of a 360-day year composed of twelve 30-day months and, for partial months, on the basis of the number of days actually elapsed in a 30-day month. Interest is payable semi-annually in arrears in cash at the Cash Interest Rate or by PIK Payments at the PIK Interest Rate, pursuant to Section 2.03(d) of the Indenture, on each June 30 and December 31, commencing on December 31, 2023, to Holders of record at the close of business on the preceding June 15 and December 15 (whether or not such day is a Business Day), respectively. The Company shall make payments on the Notes in the manner set forth in the Indenture. Additional Interest will be payable as set forth in Section 4.06(d) and Section 6.03 of the within-mentioned Indenture, and any reference to interest on, or in respect of, any Note therein shall be deemed to include Additional Interest if, in such context, Additional Interest is, was or would be payable pursuant to any of such Section 4.06(d) or Section 6.03, and any express mention of the payment of Additional Interest in any provision therein shall not be construed as excluding Additional Interest in those provisions thereof where such express mention is not made.

Any Defaulted Amounts shall accrue interest per annum at the Cash Interest Rate borne by the Notes, from, and including, the relevant payment date to, but excluding, the date on which such Defaulted Amounts shall have been paid by the Company, at its election, in accordance with Section 2.03(c) of the Indenture.

¹ Include if a global note.

² This Note will be deemed to be identified by CUSIP No. 654110AF2 from and after such time when the restrictive legend is removed pursuant to Section 2.05 of the Indenture.

³ Include if a global note.

⁴ Include if a physical note.

⁵ Include if a global note.

⁶ Include if a physical note.

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The Company shall pay the principal of and interest on this Note, if and so long as such Note is a Global Note, in immediately available funds in lawful money of the United States at the time to the Depository or its nominee, as the case may be, as the registered Holder of such Note. As provided in and subject to the provisions of the Indenture, the Company shall pay the principal of any Notes (other than Notes that are Global Notes) at the office or agency designated by the Company for that purpose. The Company has initially designated the Trustee as its Paying Agent and Note Registrar in respect of the Notes and its Corporate Trust Office in the contiguous United States of America, as a place where Notes may be presented for payment or for registration of transfer and exchange.

Reference is made to the further provisions of this Note set forth on the reverse hereof, including, without limitation, provisions giving the Holder of this Note the right to convert this Note into cash, shares of Common Stock or a combination of cash and shares of Common Stock, as applicable, on the terms and subject to the limitations set forth in the Indenture. Such further provisions shall for all purposes have the same effect as though fully set forth at this place.

This Note, and any claim, controversy or dispute arising under or related to this Note, shall be construed in accordance with and governed by the laws of the State of New York.

In the case of any conflict between this Note and the Indenture, the provisions of the Indenture shall control and govern.

This Note shall not be valid or become obligatory for any purpose until the certificate of authentication hereon shall have been signed manually by the Trustee or a duly authorized authenticating agent under the Indenture.

[Remainder of page intentionally left blank]

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IN WITNESS WHEREOF, the Company has caused this Note to be duly executed.

NIKOLA CORPORATION

By: _____

Name: _____

Title: _____

Dated:

TRUSTEE'S CERTIFICATE OF AUTHENTICATION

U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION, as Trustee, certifies that this is one of the Notes described in the within-named Indenture.

By: _____

Authorized Officer

[FORM OF REVERSE OF NOTE]

Nikola Corporation

8.00% / 8.00% Series C Convertible Senior PIK Toggle Notes due 2026

This Note is one of a duly authorized issue of Notes of the Company, designated as its 8.00% / 8.00% Series C Convertible Senior PIK Toggle Notes due 2026 (the "Notes"), initially limited to the aggregate principal amount of \$11,000,000 (as may be increased by any PIK Payments) issued under and pursuant to an Indenture dated as of June 23, 2023 (the "Indenture"), among the Company, the Guarantors and U.S. Bank Trust Company, National Association, as trustee (the "Trustee"), to which Indenture and all indentures supplemental thereto reference is hereby made for a description of the rights, limitations of rights, obligations, duties and immunities thereunder of the Trustee, the Company and the Holders of the Notes. Additional Notes may be issued in an unlimited aggregate principal amount, subject to certain conditions specified in the Indenture. Capitalized terms used in this Note and not defined in this Note shall have the respective meanings set forth in the Indenture. The originally issued Notes, all PIK Notes, and any additional Notes issued as set forth in the Indenture or this Note shall constitute a single class.

Events of Default.

In case certain Events of Default, as defined in the Indenture, shall have occurred and be continuing, the principal of, and interest on, all Notes may be declared, by either the Trustee or Holders of at least 25% in aggregate principal amount of Notes then outstanding, and upon said declaration shall become, due and payable, in the manner, with the effect and subject to the conditions and certain exceptions set forth in the Indenture.

Payments.

Subject to the terms and conditions of the Indenture, the Company will make all payments and deliveries in respect of the Fundamental Change Repurchase Price on the Fundamental Change Repurchase Date, the Redemption Price on any Redemption Date and the Capitalized Principal Amount on the Maturity Date, as the case may be, to the Holder who surrenders a Note to a Paying Agent to collect such payments in respect of the Note. The Company will pay cash amounts in money of the United States that at the time of payment is legal tender for payment of public and private debts.

Amendments and Waivers.

The Indenture contains provisions permitting the Company, the Guarantors and the Trustee in certain circumstances, without the consent of the Holders of the Notes, and in certain other circumstances, with the consent of the Holders of not less than a majority in aggregate principal amount of the Notes at the time outstanding, evidenced as in the Indenture provided, to execute supplemental indentures modifying the terms of the Indenture and the Notes as described therein. It is also provided in the Indenture that, subject to certain exceptions, the Holders of a majority in aggregate principal amount of the Notes at the time outstanding may on behalf of the

Holders prior to and including the date Company signs this release; provided, however, that such release shall not include claims for fraud, securities laws violations or intentional criminal acts.

4. **Extension of all Restrictive Covenants.** In exchange for receipt of the Notes waive any past Default or Event of Default under the Indenture and its consequences.

Guarantees.

The Notes are guaranteed to the extent provided Severance Benefits described in the **Indenture**.

Right to Payments.

No reference herein to Employment Agreement, the Indenture and no provision of this Note or duration of the Indenture restrictive covenants included in Section 4(g) (Nonsolicitation of Employees/Contractors), Section 4(h) (No Hire), Section 4(i) (Nonsolicitation of Customers) and Section 4(j) (Noncompete Provision) of Executive's Employee Proprietary Information and Inventions Assignment Agreement ("PIIA") will increase from one (1) year to two (2) years following the date of Executive's termination of employment.

5. Non-Disparagement. Executive will refrain from making any defamatory or disparaging statements about the Company, its board of directors, officers, management, practices, procedures, or business operations to any person or entity. The Company will instruct its officers and the members of the Board to refrain from making any defamatory or disparaging statements about the Executive to any person or entity. Nothing in this paragraph shall alter prohibit Executive, the Company or impair its respective officers and directors from providing truthful information in response to a subpoena or other legal or regulatory process. The foregoing requirement under this paragraph will not apply to any statements that Executive makes in response to any defamatory or disparaging statements made by the obligation Company (in its formal public statements), its executive officers and/or its directors regarding Executive or Executive's performance as an employee of the Company which is absolute so long as Executive's statements are, in the reasonable, good faith judgment of Executive, true and unconditional, extend no further than addressing such statements by the Company.

6. Forfeiture of Severance Benefits. Executive acknowledges and agrees that any material breach of this Agreement, the Employment Agreement, or the PIIA, including any of the restrictive covenants set forth therein, shall entitle the Company immediately to pay recover and/or deliver, cease providing the Severance Benefits, except as provided by law. All other provisions of this Agreement, the case may be, the principal (including the Redemption Price Employment Agreement, and the Fundamental Change Repurchase Price, if applicable) PIIA shall remain in full force and effect.

7. Waiver of accrued interest Unknown Claims. Executive and Company understand and agree that has the claims released above include not been paid only claims presently known to Executive and Company, but also include all unknown or capitalized on, unanticipated claims, rights, demands, actions, obligations, liabilities, and causes of action of every kind and character that would otherwise come within the consideration due upon conversion of, this Note at the place, at the respective times, at the rate and in the lawful money or shares of Common Stock, as the case may be, herein prescribed.

Registered Form; Denominations; Transfer and Exchange.

The Notes are issuable in registered form without coupons in minimum denominations of \$1.00 principal amount and integral multiples thereof. At the office or agency scope of the released claims described herein. Executive and Company referred to herein, and in the manner and subject to the limitations provided in the Indenture, Notes understand that they may be exchanged for a like aggregate principal amount of Notes of other authorized denominations, without payment of any service charge but, if required by the Company or Trustee, with payment of a sum sufficient to cover any transfer or similar tax that may be imposed in connection therewith as a result of the name of the Holder of the new Notes issued upon such exchange of Notes being hereafter discover facts different from the name of the Holder of the old Notes surrendered for such exchange.

Redemption.

The Notes shall not what they now believe to be redeemable by the true, which if known, could have materially affected their decisions to execute this release, but Executive and Company during the period from the first day immediately following the Interest Payment Date of December 31, 2023 to but excluding June 1, 2025. (x) From June 23, 2023 through the Interest Payment Date of December 31, 2023 and (y) nevertheless hereby waive any claims or rights based on different or after June 1, 2025 and prior to the 26th Scheduled Trading Day immediately preceding the Maturity Date, the Company may, at its option, redeem all (and not less than all) of the Notes in accordance with the terms and subject to the conditions specified in the Indenture. No sinking fund is provided for the Notes.

Fundamental Change Repurchase Right

Upon the occurrence of a Fundamental Change or Change in Control Transaction, the Holder has the right, at such Holder's option, to require the Company to repurchase for cash all of such Holder's Notes or any portion thereof (in principal amounts of \$1,000 or integral multiples of \$1.00 in excess thereof) on the Fundamental Change Repurchase Date at a price equal to the Fundamental Change Repurchase Price.

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Conversion Rights.

Subject to the provisions of the Indenture, the Holder hereof has the right, at its option, during certain periods and upon the occurrence of certain conditions specified in the Indenture, prior to the close of business on the second Scheduled Trading Day immediately preceding the Maturity Date, to convert any Notes or portion thereof that is \$1,000 or an integral multiple of \$1.00 in excess thereof, into cash, shares of Common Stock or a combination of cash and shares of Common Stock, as applicable, at the Conversion Rate specified in the Indenture, as adjusted from time to time as provided in the Indenture.

Terms used in this Note and defined in the Indenture are used herein as therein defined.

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ABBREVIATIONS

The following abbreviations, when used in the inscription of the face of this Note, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM = as tenants in common

UNIF GIFT MIN ACT = Uniform Gifts to Minors Act

CUST = Custodian

TEN ENT = as tenants by the entireties

JT TEN = joint tenants with right of survivorship and not as tenants in common

Additional abbreviations may also be used though not in the above list.

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SCHEDULE A additional facts.⁷

SCHEDULE OF EXCHANGES OF NOTES

Nikola Corporation

8.00% / 8.00% Series C Convertible Senior PIK Toggle Notes due 2026

The initial principal amount of this Global Note is _____ DOLLARS (\$[_____]). The following increases or decreases in this Global Note have been made:

Date of exchange "EXECUTIVE"	Amount of increase in principal amount of this Global Note	Principal amount of this Global Note following such decrease or increase	Signature of authorized signatory of Trustee or Custodian "COMPANY"
	of decrease in principal amount of this Global Note		

NIKOLA CORPORATION

<Name>

By: _____

Date: _____

Name: _____

Title: _____

Date: _____



Exhibit 10.5

August 4, 2023

Michael Lohscheller

Re: Executive Transition Services Agreement

Dear Michael:

This letter agreement (the "Letter Agreement") is intended to document our agreements with respect to the terms of your resignation and as an amendment of certain specific terms of the Executive Compensation Agreement, dated February 2, 2022, between you and Nikola Corporation (the "Company"), as first amended effective as of August 9, 2022, and as amended again effective as of April 3, 2023 (as amended, the "Executive Employment Agreement"). In the event of any conflict between this Letter Agreement and the Executive Employment Agreement, this Letter Agreement shall control. Defined terms shall have the meanings specified in the Executive Employment Agreement unless otherwise defined herein.

1. **Resignation as CEO and President as of Transition Date.** Pursuant to your request, we have agreed that you will resign as the Company's President and Chief Executive Officer ("CEO") effective as of August 4, 2023 (the "Transition Date"), and as a member of the Company's Board of Directors, effective as of August 31, 2023, in each case without need for further action. Except as expressly set forth in this Letter Agreement, you formally resign from all offices, positions, titles, and capacities you now hold or have held with Company and its affiliates, effective as of the Transition Date. The Company hereby accepts this resignation. Between the date of this Letter Agreement and the Transition Date, the terms of the Executive Employment Agreement shall remain unmodified.
2. **Transition Period.** Notwithstanding your resignation as President and CEO on the Transition Date, from the Transition Date through September 29, 2023 (the "Transition Period"), you will continue to be an employee of Company as a senior advisor. During the Transition Period, you agree to be available for reasonable periods of time to provide transitional assistance or to work on special projects, all at the discretion of the Board and the new Chief Executive Officer of the Company. For as long as you provide such assistance and work on special projects as requested during the Transition Period, and except as otherwise provided in this Letter Agreement, you will continue to earn and receive your current annual salary, paid bi-weekly less payroll deductions and all required withholdings, and benefits during the Transition Period. Except as

otherwise provided in this Letter Agreement, you will continue to be treated as an employee for purposes of all of the Company's benefit plans during the Transition Period. Your employment with the Company will terminate at the end of the Transition Period and you will be entitled to no further compensation or benefits but for those provided by this Letter Agreement.

At the end of the Transition Period or, if earlier, upon request by the Company, you agree to immediately return to Company all documents, records, and materials belonging and/or relating to Company, and all copies of all such materials. At the end of the Transition Period,

or if earlier, upon request by the Company, you further agree to destroy such records maintained by you on your own computer equipment.

For purposes of the Executive Employment Agreement, you agree and acknowledge that your role change from President and CEO to senior advisor is voluntary and shall not be treated as a triggering event for Good Reason under the Executive Employment Agreement.

3. **Stock Awards.** Provided that you remain employed through the Transition Period in accordance with Paragraph 1 above, provide the services requested during the Transition Period in accordance with Paragraph 2 above, and continue to comply with terms of your Employee Proprietary Information and Assignment Agreement ("PIIA"):

- a. The Transition Period will be counted as "Service" (as defined in the Company's 2020 Stock Incentive Plan (the "2020 Plan")) for purposes of determining the vesting of any equity award previously granted under the 2020 Plan that is outstanding and unvested as of the last day of the Transition Period; and
- b. In recognition of your role in expanding commercial sales of the battery-electric truck, launching the Company's Class 8 hydrogen fuel cell electric truck, advancing the organization's production capabilities in Coolidge, AZ, reducing cash usage, facilitating the sale of the Company's Europe-based joint venture, and launching the Company's global hydrogen energy brand, HYLA, subject to your continued Service through the Transition Period, your Time-Vested Awards that are outstanding, unvested, and scheduled to vest during 2024 shall vest, effective as of the last day of the Transition Period. The settlement of any such vested Time-Vested Awards shall occur following the release of the Company's Q3 earnings in early November 2023 during an open trading window.

Except as set forth in this Paragraph 3, any Time-Vested Awards or Performance Awards that are outstanding and unvested as of the last day of the Transition Period shall be cancelled and forfeited as of such date.

4. **Termination During the Transition Period.** The terms of the Executive Employment Agreement shall remain in place during the Transition Period and the parties retain their rights to terminate the senior advisor relationship prior to the end of the Transition Period. Notwithstanding the foregoing, in the event of an Involuntary Termination of your employment prior to the last day of the Transition Period, subject to your satisfaction of the Severance Conditions set forth in the Executive Employment Agreement, you will continue to receive compensation under Paragraphs 2 and 3 of this Letter Agreement through the last day of the Transition Period. For the avoidance of doubt, in no event shall the Severance Benefits set forth in the Executive Employment Agreement become payable.

5. **Restrictive Covenants.** You acknowledge and agree that you are bound and continue to be bound by the terms of your PIIA through and after the Transition Period. In exchange for receipt of the compensation set forth under Paragraphs 2 and 3, the duration of the restrictive covenants included in Section 4(g) (Nonsolicitation of Employees/Contractors), Section 4(h) (No Hire), Section 4(i) (Nonsolicitation of Customers) and Section 4(j) (Noncompete Provision) of your PIIA will increase from one (1) year to two (2) years following the last day of the Transition Period.

6. **Non-Disparagement.** You agree to refrain from making any defamatory or disparaging statements about the Company, its board of directors, officers, management, practices, procedures, or business operations to any person or entity. Nothing in this paragraph shall prohibit you from providing truthful information in response to a subpoena or other legal or regulatory process.

7. **General Provisions.**

- a. **Consistency With Applicable Law.** You acknowledge and agree that nothing in this Agreement prohibits you from reporting possible violations of law to any governmental agency or entity or making other disclosures that are protected under the whistleblower provisions of federal, state or local laws or regulations.
- b. **Severability.** The obligations imposed by, and the provisions of, this Letter Agreement are severable and should be construed independently of each other. If any court of competent jurisdiction determines that any provision of this Letter Agreement is invalid or unenforceable, then such invalidity or unenforceability shall have no effect on the other provisions hereof, which shall remain valid, binding and enforceable and in full force and effect, and such invalid or unenforceable provision shall not affect the validity of any other provision.
- c. **Effect of Breach.** In the event that you breach any provision of this Letter Agreement or any restrictive covenant agreement between the Company and you, you agree that the Company may suspend all payments and benefits to you as a result of this Letter Agreement, recover from you any damages suffered as a result of such breach and recover from you any reasonable attorneys' fees or costs it incurs as a result of such breach. In addition, you agree that the Company shall be entitled to injunctive or other equitable relief, without the necessity of posting bond, as a result of a breach by you of any provision of this Letter Agreement.
- d. **Successors/Assigns.** The Company shall assign this Letter Agreement to any successor to all or substantially all of the business and assets of the Company and the Company shall require successor to expressly assume and agree to in the same manner and to the same extent that the Company would be required to perform it if no such succession had taken place.
- e. **Governing Law.** The terms of this Letter Agreement and the resolution of any dispute as to the meaning, effect, performance or validity of this Agreement or arising out of, related to, or in any way connected with, this Letter Agreement, your employment with the Company (or termination thereof) or any other relationship between you and the Company (a "Dispute") will be governed by the laws of the State of Arizona, without giving effect to the principles of conflict of laws. To the extent not subject to arbitration as described below, you and the Company consent to the exclusive jurisdiction of, and venue in, the state courts in State of Arizona (or in the event of exclusive federal jurisdiction, the courts of the District of Arizona in connection with any Dispute or any claim related to any Dispute).

Except as prohibited by law, you agree that any Dispute between you and the Company (or between you and any officer, director, employee or affiliates of the

-3-

Company, each of whom is hereby designated a third party beneficiary of this Letter Agreement regarding arbitration) will be resolved through binding arbitration in Maricopa County, Arizona under the rules of the American Arbitration Association and the Arbitration Rules set forth in Arizona Rules of Civil Procedure. Nothing in this arbitration provision is intended to limit any right you may have to file a charge with or obtain relief from the National Labor Relations Board or any other state or federal agency. You agree that such arbitration shall be conducted on an individual basis only, not a class, collective or representative basis, and hereby waive any right to bring class-wide, collective or representative claims before any arbitrator or in any forum. THE PARTIES UNDERSTAND THAT BY AGREEING TO ARBITRATE DISPUTES THEY ARE WAIVING ANY RIGHT THEY MIGHT OTHERWISE HAVE TO A JURY TRIAL. This arbitration provision is not intended to modify or limit substantive rights or the remedies available to the parties, including the right to seek interim relief, such as injunction or attachment, through judicial process, which shall not be deemed a waiver of the right to demand and obtain arbitration.

Except as expressly modified by this Amendment, all of the terms and provisions of the Executive Employment Agreement are and shall remain unchanged and in full force and effect, on the terms and subject to the conditions set forth therein.

Please sign and date this Amendment to confirm your agreement to the terms described above and return it to . For the purposes of this Letter Agreement, a facsimile or electronic signature shall serve as an original.

Sincerely,

NIKOLA CORPORATION

BY: /s/ Stephen J. Girsky
Stephen J. Girsky
For the Board of Directors

Accepted:

/s/ Michael Lohscheller
Michael Lohscheller

Aug 4, 2023

Date

7 Include if a global note.

R-5-4-

ATTACHMENT 1

[FORM OF NOTICE OF CONVERSION]

To: Nikola Corporation

To: U.S. Bank Trust Company, National Association
Global Corporate Trust
111 Fillmore Avenue East
Saint Paul, MN 55107

The undersigned registered owner of this Note hereby exercises the option to convert this Note, or the portion hereof (that is \$1,000 Capitalized Principal Amount or an integral multiple of \$1.00 in excess thereof) below designated, into cash, shares of Common Stock or a combination of cash and shares of Common Stock, as applicable, in accordance with the terms of the Indenture referred to in this Note, and directs that any cash payable and any shares of Common Stock issuable and deliverable upon such conversion, together with any cash for any fractional share, and any Notes representing any unconverted principal amount hereof, be issued and delivered to the registered Holder

hereof unless a different name has been indicated below. If any shares of Common Stock or any portion of this Note not converted are to be issued in the name of a Person other than the undersigned, the undersigned will pay all documentary, stamp or similar issue or transfer taxes, if any in accordance with Section 14.02(d) and Section 14.02(e) of the Indenture. Any amount required to be paid to the undersigned on account of interest accompanies this Note. Capitalized terms used herein but not defined shall have the meanings ascribed to such terms in the Indenture.

Dated: _____

Signature(s)

Signature Guarantee

Signature(s) must be guaranteed by an eligible guarantor institution (banks, stock brokers, savings and loan associations and credit unions) with membership in an approved signature guarantee medallion program pursuant to Securities and Exchange

1

Commission Rule 17Ad-15 if shares of Common Stock are to be issued, or Notes are to be delivered, other than to and in the name of the registered holder.

Fill in for registration of shares if to be issued, and Notes if to be delivered, other than to and in the name of the registered holder:

(Name)

(Street Address)

(City, State and Zip Code)

Please print name and address

Principal amount to be converted (if less than all): \$_____,000

NOTICE: The above signature(s) of the Holder(s) hereof must correspond with the name as written upon the face of the Note in every particular without alteration or enlargement or any change whatever.

Social Security or Other Taxpayer
Identification Number

2

ATTACHMENT 2

[FORM OF FUNDAMENTAL CHANGE REPURCHASE NOTICE]

To: Nikola Corporation

To: U.S. Bank Trust Company, National Association
Global Corporate Trust
111 Fillmore Avenue East
Saint Paul, MN 55107

The undersigned registered owner of this Note hereby acknowledges receipt of a notice from Nikola Corporation (the "Company") as to the occurrence of a Fundamental Change with respect to the Company and specifying the Fundamental Change Repurchase Date and requests and instructs the Company to pay to the registered holder hereof in accordance with Section 15.02 of the Indenture referred to in this Note the applicable Fundamental Change Repurchase Price. Capitalized terms used herein but not defined shall have the meanings ascribed to such terms in the Indenture.

In the case of Physical Notes, the certificate numbers of the Notes to be repurchased are as set forth below:

Dated: _____

Signature(s)

Social Security or Other Taxpayer
Identification Number

Principal amount to be repurchased (if less than all): \$ _____,000

NOTICE: The above signature(s) of the Holder(s) hereof must correspond with the name as written upon the face of the Note in every particular without alteration or enlargement or any change whatever.

1

[FORM OF ASSIGNMENT AND TRANSFER]

To: U.S. Bank Trust Company, National Association

Global Corporate Trust

111 Fillmore Avenue East

Saint Paul, MN 55107

For value received _____ hereby sell(s), assign(s) and transfer(s) unto _____ (Please insert social security or Taxpayer Identification Number of assignee) the within Note, and hereby irrevocably constitutes and appoints _____ attorney to transfer the said Note on the books of the Company, with full power of substitution in the premises.

In connection with any transfer of the within Note, the undersigned confirms that such Note is being transferred:

- To Nikola Corporation or a subsidiary thereof; or
- Pursuant to a registration statement that has become or been declared effective under the Securities Act of 1933, as amended, and was effective at the time of such transfer; or
- Pursuant to and in compliance with Rule 144A under the Securities Act of 1933, as amended; or
- Pursuant to and in compliance with Rule 144 under the Securities Act of 1933, as amended, or any other available exemption from the registration requirements of the Securities Act of 1933, as amended.

1

Dated: _____

Signature(s)

Signature Guarantee

Signature(s) must be guaranteed by an eligible guarantor institution (banks, stock brokers, savings and loan associations and credit unions) with membership in an approved signature guarantee medallion program pursuant to Securities and Exchange Commission Rule 17Ad-15 if Notes are to be delivered, other than to and in the name of the registered holder.

NOTICE: The signature on the assignment must correspond with the name as written upon the face of the Note in every particular without alteration or enlargement or any change whatever.

[FORM OF NOTATIONAL GUARANTEE]

_____, 20____

The Guarantor named on the signature page hereto (hereinafter referred to as the **“Guarantor”**, which term includes any successors or assigns under that certain Indenture, dated as of June 23, 2023 by and among Nikola Corporation (the **“Company”**), the guarantors party thereto and the trustee thereto (as may be amended and supplemented from time to time, the **“Indenture”**)), has guaranteed the Company’s 8.00% / 8.00% Series C Convertible Senior PIK Toggle Notes due 2026 (the **“Notes”**) and the Obligations of the Company under the Indenture. Capitalized terms used herein have the same meanings given in the Indenture unless otherwise indicated.

The Obligations of each Guarantor to the Holders and to the Trustee pursuant to this Note Guarantee and the Indenture are expressly set forth in Article 13 of the Indenture which is hereby incorporated by reference herein.

No stockholder, employee, officer, director or incorporator, as such, past, present or future of each Guarantor shall have any liability under this Note Guarantee by reason of his or its status as such stockholder, employee, officer, director or incorporator.

This is a continuing guarantee and shall remain in full force and effect and shall be binding upon each Guarantor and its successors and assigns until full and final payment of all of the Company’s obligations under the Notes and Indenture or until released in accordance with the Indenture and shall inure to the benefit of the successors and assigns of the Trustee and the Holders, and, in the event of any transfer or assignment of rights by any Holder or the Trustee, the rights and privileges herein conferred upon that party shall automatically extend to and be vested in such transferee or assignee, all subject to the terms and conditions hereof. This is a guarantee of payment and not of collection.

The Obligations of each Guarantor under its Note Guarantee shall be limited to the extent necessary to ensure that it does not constitute a fraudulent transfer or conveyance or a voidable preference, financial assistance or improper corporate benefit, or violating the corporate purpose of the relevant Guarantor or any applicable capital maintenance or similar laws or regulations affecting the rights of creditors generally under any applicable law or regulation.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties hereto have caused this Notational Guarantee to be duly executed as of the date first above written.

[GUARANTOR],
as a Guarantor

By:
Name:
Title:

[Signature Page to Notational Guarantee]

CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER PURSUANT TO
SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, Michael Lohscheller, Stephen J. Girskey, certify that:

1. I have reviewed this Quarterly Report on Form 10-Q of Nikola Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: August 4, 2023 November 2, 2023

/s/ Michael Lohscheller Stephen J. Girskey

Michael Lohscheller Stephen J. Girskey

President and Chief Executive Officer

(Principal Executive Officer)

CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER PURSUANT TO SECTION 302
OF THE SARBANES-OXLEY ACT OF 2002

I, Anastasiya Pasterick, certify that:

1. I have reviewed this Quarterly Report on Form 10-Q of Nikola Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: August 4, 2023 November 2, 2023

/s/ Anastasiya Pasterick

Anastasiya Pasterick
Chief Financial Officer
(Principal Financial Officer)

CERTIFICATION PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002

In connection with the Quarterly Report of Nikola Corporation (the "Company") on Form 10-Q for the quarterly period ended June 30, 2023 September 30, 2023, as filed with the Securities and Exchange Commission (the "Report"), I, Michael Lohscheller, Stephen J. Girskey, President and Chief Executive Officer, certify, pursuant to 18 U.S.C. §1350, as added by §906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

1. The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: August 4, 2023 November 2, 2023

/s/ Michael Lohscheller Stephen J. Girskey

Michael Lohscheller Stephen J. Girskey
President and Chief Executive Officer
(Principal Executive Officer)

CERTIFICATION PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002

In connection with the Quarterly Report of Nikola Corporation (the "Company") on Form 10-Q for the quarterly period ended **June 30, 2023** **September 30, 2023**, as filed with the Securities and Exchange Commission (the "Report"), I, Anastasiya Pasterick, Chief Financial Officer, certify, pursuant to 18 U.S.C. §1350, as added by §906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

1. The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: **August 4, 2023** **November 2, 2023**

/s/ Anastasiya Pasterick

Anastasiya Pasterick
Chief Financial Officer
(Principal Financial Officer)

DISCLAIMER

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